



Fall 2011

A Right to Legal Aid: The ABA Model Access Act in International Perspective

James Maxeiner

University of Baltimore School of Law, jmaxeiner@ubalt.edu

Follow this and additional works at: http://scholarworks.law.ubalt.edu/all_fac



Part of the [Legal Profession Commons](#)

Recommended Citation

A Right to Legal Aid: The ABA Model Access Act in International Perspective, 13 Loy. J. Pub. Int. L. 61 (2011)

This Article is brought to you for free and open access by the Faculty Scholarship at ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

A RIGHT TO LEGAL AID: THE ABA MODEL ACCESS ACT IN INTERNATIONAL PERSPECTIVE

*James R. Maxeiner**

ABSTRACT

For over two centuries America has failed to fulfill its promise to bring justice to all. Although the United States was among the first of nations to proclaim access to justice for the poor, it is among the last of modern nations to try to provide it. Sometimes, it seems, Americans have forgotten their promise. Maybe they have given up. In August 2010 the American Bar Association moved to revive the nation's forgotten promise. It proposed the ABA Model Access Act. The Act would sidestep Supreme Court decisions that deny a constitutional right to civil legal aid and create a modest statutory one. It would recognize that legal aid in civil litigation is not charity, but a right that is an essential part of a rule-of-law state. The Act is a framework law and leaves details to be filled in by enacting bodies and by institutions charged with implementing it. This article examines the ABA Act in international perspective to inform future enactments. It suggests that meaningful legal aid requires legal reform generally.

INTRODUCTION

Equal justice under law is a credo of American law so firmly

* © 2011 James R. Maxeiner, J.D. Cornell, LL.M. Georgetown, Ph.D. in law (Dr. jur.), Ludwig Maximilian University (Munich, Germany). Associate Professor of Law and Associate Director, Center for International and Comparative Law, University of Baltimore School of Law. This article was written with the support of a summer research stipend of the University of Baltimore School of Law.

held that it is carved into the frieze above the main entrance to the building of the United States Supreme Court.¹ Justice is not equal if it is denied to those who cannot afford to purchase it.²

In 1776 America's founders declared in state declarations of rights that everyone "ought to have justice and right, freely without sale, fully without any denial...."³ In articles known as "open courts" clauses they set a goal of justice—for all—not just for those who could pay for it.⁴ They proclaimed this gospel to the world. In 1792, Joel Barlow, a confidant of Thomas Paine in London and Paris, and soon American plenipotentiary to Algiers, Tunis and Tripoli, lectured European rulers that Americans sought courts "equally open to the poor as to the rich."⁵ Barlow admonished them that for states "to hinder [any man] from bringing [a lawsuit] that is just, is a crime of the state against him."⁶ Yet the poor did not always have access to American courts

1. The Maryland Access to Justice Commission uses a beautiful color picture of the frieze as the cover of its Fall 2009 INTERIM REPORT & RECOMMENDATIONS. It is freely rendered on the cover of HARRISON TWEED, *THE LEGAL AID SOCIETY NEW YORK CITY 1876 – 1951* (The Legal Aid Soc'y ed. 1954). The entrance was recently closed out of security concerns. See Adam Liptak, *Step Away from the Courthouse Doors*, N.Y. TIMES, MAY 4, 2010, at A15.

2. See, e.g., *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Plurality opinion by Black, J.)

3. See, e.g., EDWARD C. PAPENFUSE & GREGORY A. STIVERSON, *THE DECISIVE BLOW IS STRUCK, A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTION CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION* (1977). Many states include such provisions in their state constitutions. See Daniel W. Halston, *The Meaning of the Massachusetts 'Open Courts' Clause and Its Relevance to the Current Court Crisis*, 88 MASS. L. REV. 122 (2004); Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279 (1995); Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005, 1006 (2001). The ABA prefers the more modern—and more international—term "access to justice."

4. *Id.*

5. JOEL BARLOW, *ADVICE TO THE PRIVILEGED ORDERS: IN THE SEVERAL STATES OF EUROPE, RESULTING FROM THE NECESSITY AND PROPRIETY OF A GENERAL REVOLUTION IN THE PRINCIPLE OF GOVERNMENT*, PART I, 133 (3rd ed. 1793, 1st ed. 1792). According to his biographer, "during the last half of 1793 Barlow supplanted Thomas Paine as the leading Republican author writing in English." RICHARD BUEL, JR. & JOEL BARLOW: *AMERICAN CITIZEN IN A REVOLUTIONARY WORLD* 171 (2011).

6. Buel & Barlow, *supra* note 5, at 159.

then⁷ and they do not have it now.

Today Europe is more than a century ahead of America in achieving equal access to courts. Already in 1892, one hundred years after Barlow wrote, and the year that America's school children began to recite a pledge of allegiance to their flag ending with a call for "liberty and justice for all,"⁸ a poor American in Paris could count on access to courts in France, but not at home.⁹ Nearly two hundred years after Barlow chided Europeans that Americans protected all litigants and Europeans did not, the United States Supreme Court *denied* that the U.S. Constitution's guarantee of due process includes civil litigation aid, while the European Court of Human Rights held that the European Convention of Human Rights Article 6 guarantee of a fair trial *does* include a right to such aid.¹⁰ Today, forty-five member states of the Council of Europe, including twenty states formerly under Communist rule,¹¹ do what no one of the fifty United States of

7. See *Note of the Editor*, THE POLITICAL WRITINGS OF JOEL BARLOW 98, 99–100 (Mott & Lyon ed. 1796) ("Let us not delude the world, by impressing an opinion, that we have arrived at the summit of perfection in government and laws, – when so many glaring evils are profusely scattered around, – when the law's delay – the expense of justice – and the insolence of office, are as much to be complained of, in most of the American States, as under the much execrated systems of Europe.").

8. The Pledge of Allegiance, 4 U.S.C. § 4. First published in THE YOUTH'S COMPANION, September 8, 1892.

9. D. Chauncey Brewer, *The Status of Indigent Americans in French Courts*, 26 AM. L. REV. 540 (1892). See also Convention du 17 juillet 1905 relative à la procédure civile, arts. 20-24 [Convention on civil procedure concluded 17 July 1905], available at http://www.hcch.net/index_en.php?act=text.display&tid=16, superseded by the Convention on Civil Procedure concluded 1 March 1954, arts. 20-24, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=33 (providing for national treatment in availability of legal aid).

10. Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS L. REV. 769 (2006). See also EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), EUROPEAN JUDICIAL SYSTEMS EDITION 2010 (DATA 2008) 49-82 (2010) [hereinafter CEPEJ]: EFFICIENCY AND QUALITY OF JUSTICE (2010); EUROPÄISCHE KOMMISSION, LEITFADEN DER BERATUNGS- UND PROZESSKOSTENHILFE IM EUROPÄISCHEN WIRTSCHAFTSRAUM (1996); STUDY ON THE TRANSPARENCY OF COSTS OF CIVIL JUDICIAL PROCEEDINGS IN THE EUROPEAN UNION – FINAL REPORT 228-283 (Contract JLS/2006/C4/007-30-CE-0097604/00-36 for the Commission Européenne – DG for Justice, Freedom and Security, 2007) available at <https://e-justice.europa.eu/home.do?plang=en&action=home>.

11. Notwithstanding the decision of the European Court of Justice, two Council of Europe states, Azerbaijan and Ukraine, have yet to implement a right to legal aid in civil litigation. CEPEJ, *supra* note 10, at 50.

America does: guarantee access to civil justice.¹²

Maybe—just maybe—some American states will catch up with their European counterparts. In 2010 the American Bar Association (“ABA”) proposed the ABA Model Access Act.¹³ Adoption of that Act would make legal aid a right rather than charity in cases where “basic human needs” are at stake.

This article views the ABA Model Access Act in international—particularly German—perspective. Part I summarizes the Act. It shows that the Act is intentionally incomplete and requires supplementation. Part II examines legal aid in America as Europeans might view it. Part III summarizes the German system of litigation aid and shows ways in which German experiences might inform adoption and implementation of the American Model Act. Part IV provides an historical explanation for the differences between German and American approaches. The Conclusion raises the question of whether effective legal aid is possible without substantial legal reform.

I. LEGAL AID UNDER THE ABA MODEL ACCESS ACT

The ABA Model Access Act would change legal aid but would not alter the litigation system.¹⁴ It would give some indigent persons a right to some legal aid in some litigated cases.¹⁵ It would

12. *See id.* at 50, 296.

13. This is not the first time that the ABA has acted in the area, but there have not been many others. *See* Part III *infra*. Recently, interest in legal aid has increased. In 2006, the American Bar Association House of Delegates unanimously “RESOLVED, that the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.” Resolution 112A passed the August 7, 2006. In the wake of the worst recession in decades, in 2009 the United States Department of Justice created an “Access to Justice Initiative.” *See* <http://www.justice.gov/atj/> (last visited Nov. 28, 2011). At least thirteen states have recently taken action to improve access to justice. *See* AM. BAR ASS’N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS *ET AL*, REPORT TO THE HOUSE OF DELEGATES, R-105 REVISED, at 1-7 (August 2010) [hereinafter REPORT]. The Report proposed and the House of Delegates adopted the ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings.

14. *See* Part I(C) *infra*.

15. *See* Part I(A)(2) *infra*.

create a new institution—a “State Access Board”—to design, build, and administer a new system. The board in each state would promulgate procedures to determine claims for legal aid.¹⁶

The Model Act is not a complete system of legal aid. It is “a starting point to turn commitment into action;” it provides “the means to introduce the concept and begin discussions... that will lead to implementation of a statutory right to counsel.”¹⁷ It presents legislators with choices. It compels administrators to create implementing regulations and policies.

The Model Act assumes, but does not require, that legal aid will be provided by salaried lawyers employed by legal aid organizations.¹⁸ Historically, the United States has relied on this approach. The Model Act does not, however, preclude using ordinary lawyers compensated from public funds.¹⁹ Historically, Germany and other countries have used this approach²⁰

In Part I, I point out those choices. I discuss the right itself, in Subpart A, the State Access Board in Subpart B, and the choices the legislature or the Board will need to make to set up a functioning system of legal aid in Subpart C.

A. THE RIGHT TO LEGAL AID

The most important innovation of the ABA Model Access Act is to make access to justice in some civil cases a matter of right and not of charity.²¹ Legislative adoption would recognize that the right to be heard in court should not be conditioned on paying court costs or attorneys’ fees.²² It would overturn judicial rejection

16. See Part I(B) *infra*.

17. REPORT, *supra* note 13, at 6.

18. See Part I(C)(2) *infra*.

19. This latter approach sometimes is referred to as “judicare.” See E. Clinton Bamberger, Jr., *The American Approach: Public Funding, Law Reform and Staff Attorneys*, 10 CORNELL INT’L L.J. 207, 210-11 (1976).

20. See Part III(B) *infra*.

21. *Id.*

22. It would parallel a similar legislative recognition that the right to be heard in elections should not be conditioned on ability to pay a poll tax. U.S. CONST. amend. XXIV. Only later did the Supreme Court reverse earlier precedent and secure a right to vote free of costs. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), *over-*

of such a right.²³

1. BASIS FOR THE RIGHT

The Model Act declares that “[f]air and equal access to justice is a fundamental right in a democratic society.”²⁴ The drafters quote U.S. Supreme Court Justice Wiley Rutledge, who told the American Bar Association: “Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion.”²⁵

The drafters of the Model Act justify their declaration of right with arguments of equal justice and of the rule of the law. They find an “impossibility of delivering justice rather than injustice in many cases unless both sides, not just those who can afford it, are represented by lawyers.”²⁶ Moreover, equal justice under law, they say, “forms the foundation of America’s social contract with all its citizens.”²⁷

Elsewhere, one of the Model Act’s drafters, Justice Earl Johnson, Jr., explains the social contract argument. In the social contract, he writes, individuals give up their natural right to self-help and bestow on the state a monopoly of force. In return they receive a promise of equal administration of justice.²⁸ If

ruling *Breedlove v Suttles*, 302 U.S. 277 (1937).

23. The courts have largely ignored the states’ open courts clauses. They have recognized in the federal due process clauses rights of access only with respect to “fundamental constitutional rights.” See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 676 (7th ed. 2004) (“Where access to the judicial process is not essential to the exercise of fundamental constitutional rights the state will be free to allocate access to the judicial machinery on any system or classification which is not totally arbitrary.”)

24. AM. BAR ASS’N WORKING GROUP ON CIVIL RIGHT TO COUNSEL, A.B.A. REPORT TO THE HOUSE OF DELEGATES (2011). *Cf.*, Roger C. Cramton, *An International Comparison of Legal Services for the Poor*, 10 CORNELL INT’L L.J. 205 (1977) (noting “[t]he idea that everyone in society, without regard to station or resources, should have access to the institutions of justice is inherent in the liberty, equality, and due process that the new nation was created to protect and advance”).

25. REPORT, *supra* note 13, at 9.

26. Charity, they report, “has proven woefully inadequate.” *Id.*

27. *Id.*

28. Earl Johnson, Jr., *Equality before the law and the social contract: When will the United States finally guarantee its people the equality before the law the social contract*

administration of justice depends on a party's wealth, justice is not equal, the social contract is broken, and the affected party ought not be condemned if he or she resorts to self-help.²⁹

By statute the Model Act would realize what is known as "civil Gideon," that is, a right to state assistance in civil cases. In 1963 in *Gideon v. Wainwright*³⁰ the U.S. Supreme Court found a constitutional right to state-provided counsel in criminal cases. But in 1981 in *Lassiter v. Dept. of Social Serv. of Durham County*,³¹ the Court denied such a right in civil cases generally. In *Lassiter* it allowed for the possibility of a right to state provided counsel in civil cases where personal liberty is at stake. In *Turner v. Rogers* in 2011, however, it rejected that claim in a case of one-year imprisonment for civil contempt of court.³² The ABA Model Access Act would, in effect, overturn *Lassiter* and *Turner* by creating a limited statutory right to legal aid in some civil cases.

2. SCOPE OF THE RIGHT

The Model Act does not create a comprehensive right to legal aid. It would be, the drafters say, a "beginning."³³ Besides eligibility requirements and limits on assistance, it has two particularly important limitations. First, the Act provides that the right to assistance applies only when "basic human needs" are at stake. Second, it covers only litigation and not counseling.

Basic human needs. The Model Act recognizes a right to

demands?, 37 FORDHAM URB. L.J. 157, 159-160 (2010); Earl Johnson, Jr., *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2(1) SEATTLE J. FOR SOC. JUST. 201, 205 (2003).

29. *Id.* To the same effect in Germany, see ZIVILPROZESS UND PRAXIS: DAS VERFAHRENSRECHT ALS GRUNDLAGE JURISTISCHER TÄTIGKEIT, FESTSCHRIFT FÜR EGON SCHNEIDER ZUR VOLLENDUNG DES 70. LEBENSJAHRE 267 (1997) (citing Peter Philippi, *Prozeßkostenhilfe und Grundgesetz*); VICTOR SCHNEIDER, INT'L LAW ASS'N, REPORT OF THE TWENTY-THIRD CONFERENCE, 184, 186 (1907); Linde, *Beitrag zur Lehre über das Armenrecht im Prozesse*, 1 ZEITSCHRIFT FÜR CIVILRECHT UND PROZESS 57, 66 (1828).

30. 372 U.S. 375 (1963).

31. 452 U.S. 18 (1981).

32. 131 S. Ct. 2507 (2011).

33. REPORT, *supra* note 13, at 9.

legal aid in cases in which “basic human needs... are at stake.”³⁴ It defines basic human needs to be “shelter, sustenance, safety, health and child custody.”³⁵ Although the listing of five needs seems intended to be exhaustive, the Commentary invites adopting jurisdictions “to make modifications, based on the unique circumstances applicable to their communities.”³⁶

Unless modified, the Act would deny legal aid in cases concerning paternity,³⁷ most contract cases (e.g., for sales of goods, for education), most tort cases (including liability claims for past personal injury), most property cases unrelated to shelter (e.g., condemnation of property not providing shelter), marital status cases not related to child custody, inheritance cases, taxation cases, and civil forfeitures.³⁸

Litigation but not counseling. Members of the drafting committee considered extending a right to legal aid to counseling as well as to litigation.³⁹ One, Justice Johnson, published a draft “State Equal Justice Act” that jurisdictions considering the Model Act should consider.⁴⁰

With respect to litigation, the Model Act provides for aid largely without regard to forum. It makes public legal services available at state expense “in any adversarial proceeding in a state trial or appellate court, a state administrative proceeding, or an arbitration hearing....”⁴¹ It does, however, exclude mediation⁴² and litigation in federal courts.⁴³

34. *Id.*

35. *Id.* at 2.

36. *Id.* at 3.

37. See Commentary to SECTION 2.

38. *Id.* (defining basic human needs).

39. See generally REPORT, *supra* note 13.

40. See Appendix to Johnson, *Equality before the Law*, *supra* note 28, at 222.

41. REPORT, *supra* note 13, at 4.

42. *Id.*

43. *Id.* at 8. The basis for this exclusion is not apparent. It might be, among other imaginable reasons, additional expense, deference to the federal system, preference for state systems, or a desire not to encourage federal public interest litigation.

B. THE STATE ACCESS BOARD

The ABA Model Access Act establishes within the state judicial system an “independent State Access Board (“Board”) with responsibility for policy-making and overall administration” of the legal aid program.⁴⁴ It empowers the Board “to promulgate regulations and policies....”⁴⁵ The Board is to “[e]nsure that all eligible persons receive appropriate public legal services when needed....”⁴⁶ It is to oversee the State Access Fund created to pay for legal aid.⁴⁷ The Board has wide-ranging authority to create a unique system of legal aid.

Although the Model Act prescribes an independent board within the state’s judiciary system, the Commentary to Section 4 acknowledges that that may be too cumbersome or too expensive for smaller states.⁴⁸ It suggests that they consider assigning the Board’s responsibilities to an entirely independent entity, to the state bar association, to the state court system or to the executive branch.⁴⁹ In any case, however, the Model Act provides that a majority of Board members will be lawyers.⁵⁰

C. FUTURE AMERICAN LEGAL AID SYSTEMS

The Model Act leaves to State Access Boards critical design decisions with respect to eligibility, certifying organizations, and procedures determining eligibility. It thereby practically assures that there will be substantial variations in legal aid systems from state to state.

1. ELIGIBILITY

The Model Act imposes two prerequisites for granting legal aid: economic need and case merit. It creates special rules for appeals.

44. *Id.* at § 4.A.

45. *Id.* at § 4.D.

46. *Id.* at § 4.E.i.

47. *Id.* at § 4.E.iv.

48. REPORT, *supra* note 13, at § 4. cmt.

49. *Id.*

50. *Id.* at §4.B.

Economic need. The Model Act limits assistance to people “who are unable to afford adequate legal assistance.” It leaves to the State Access Boards determination of what that means.⁵¹ It anticipates that annual income will be the principal variable and the federal poverty definition the principal standard. It prescribes that aid ordinarily should be granted where “household income falls at or below [125 percent] of the federal poverty level.”⁵²

The Model Act excludes from eligibility applicants in three circumstances where legal aid is deemed unnecessary: (1) proceedings where lawyers are not allowed (e.g., in some states, small claims courts); (2) proceedings where applicants are already receiving legal representation through existing civil legal aid programs, contingent fee, insurance or class action representation; and (3) proceedings that are uncontested, unless there is a finding that the interests of justice require representation.⁵³

Case merit. If the person seeking legal aid is a plaintiff, the Model Act authorizes “full public legal representation” only if the potential plaintiff has “a reasonable possibility of achieving a successful outcome.”⁵⁴ On the other hand, if the person seeking legal aid is a defendant, the Act authorizes representation only if the defendant has “a non-frivolous defense.”⁵⁵ The Model Act does not define a “successful outcome.” Is a case successful if it results in a judgment against a person who cannot pay? Is it successful if a person of sufficient means would throw the claim away because the probable recovery is inadequate to justify the costs? Is it successful if it settles for nuisance value? The Model Act leaves these questions to be answered by the State Access Board policies and regulations.

Appeals. The Model Act requires parties to make new

51. *Id.* at § 3.D.

52. *Id.* The Commentary to Section 3 suggests that implementing jurisdictions might consider a higher threshold, such as 150 percent, or a formula that takes into account other factors relevant to ability to pay, such as applicant’s assets, which make some applicants more able to pay, or extraordinary ongoing expenses which make other applicants less able to pay.

53. *Id.* at § 3.B.iii.a.-c.

54. *Id.* at § 3.B.i.

55. *Id.*

applications on appeal and applies certain standards.⁵⁶ If the party seeking assistance won in the first instance, full assistance is available on appeal “unless there is no reasonable possibility that the appellate court will affirm the decision of the trial court....”⁵⁷ In these instances, the Board will take into account whether the applicant had the benefit of counsel during the development of the record up for review.⁵⁸ On the other hand, if the party seeking aid lost in the first instance and seeks to overturn the lower court decision, the Act applies two different standards depending upon the nature of the relief sought. In ordinary cases, full assistance is available only if the party seeking support shows “a reasonable *probability* of success....”⁵⁹ In other cases, however, where the appellant is seeking a change in law, legal aid is to be granted “when there is a *non-frivolous argument* for extending, modifying, or reversing existing law or for establishing new law.”⁶⁰ Although this provision tracks the language of Rule 11(b)(2) of the Federal Rules of Civil Procedure (which relates to filing papers in first instance), it is sure to draw objection from critics who complain that legal aid is used to change law.⁶¹ They may rightly ask, why should appeals seeking a change in the law be subject to a more lenient standard than appeals seeking to apply the law as it is?

2. CERTIFYING ORGANIZATIONS

The Model Act directs the State Access Board to “establish, certify, and retain specific organizations to make eligibility determinations,”⁶² yet the Act does not restrict the Board in its choice of certifying organizations. In particular, it does not require that certifying organizations be independent of legal services providers.⁶³ Consequently, when certifying organizations are

56. REPORT, *supra* note 13, at § 3.B.ii.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at § 3.B.ii. See also REPORT, *supra* note 13, at 7.

61. Compare *id.*, with Fed. R. Civ. P. 11(b)(2). The Model Act does not include a parallel provision for granting aid in the first instance based on a law-changing complaint.

62. *Id.* at § 4.E.ii.

63. *Id.*

themselves providers, their certifying decisions may be challenged as self-serving. Parties opposed to extending aid may claim that the certifying organization in granting aid is just drumming up business for itself, while parties denied aid may object that the certifying organization is just conserving its resources for itself.

The Model Act does not anticipate that the courts hearing legal aid cases will routinely determine eligibility.⁶⁴ It does, however, authorize judges exceptionally to make their own assessments that unrepresented litigants require public legal representation. If a judge notifies the Board that such representation is necessary, the Board's role is limited to confirming that a basic human need is at stake and that the potential recipient meets economic needs criteria.⁶⁵ The Board is not to decide whether the case has legal merit.⁶⁶

The Model Act does not say what the Board should look for in choosing organizations to make eligibility determinations.⁶⁷ The Commentary to Section 4 suggests that the legislature should be sure to authorize the Board to appoint local legal aid organizations, including both federally and state-funded organizations, as well as any self-help centers that the state court system certifies as qualified.⁶⁸

The Model Act does not say how the Board should allocate responsibilities among certifying organizations. Should it give each exclusive competency for a specific geographic territory or for a specific subject matter area? Should it permit applicants to choose among certifying organizations? Should it permit applicants to apply to more than one certifying organization, either concurrently or consecutively? What should be the effect of one certifying organization turning down an application on a later application with another certifying organization?

64. *Id.*

65. REPORT, *supra* note 13, at § 3. cmt.

66. *Id.*

67. *Id.* at § 4.E.ii.

68. REPORT, *supra* note 13, at § 4. cmt.

3. PROCEDURES FOR DETERMINING ELIGIBILITY

The Model Act provides general instruction on granting aid. It states that “initial determinations of eligibility for services may be based on facial review of the application for assistance or the pleadings.”⁶⁹ It does not prescribe important details such as: (a) the content of the application; (b) who else (e.g., the State Access Board, the State Fund, the other party in the litigation, the court in the litigation), if anyone, is to receive notice of the application and is to be heard in the consideration of the application; (c) whether an oral hearing is required; (d) whether the body authorized to decide is to assist the applicant with the application or is to question the application’s content; and (e) what form the decision is to take (e.g., oral, written with reasons).⁷⁰

Review of legal aid decisions. The Model Act anticipates that “any initial finding of eligibility is subject to a further review after a full investigation of the case has been completed,”⁷¹ yet the Act makes no provision for such a full investigation. It says nothing more about modification or withdrawal of aid, i.e., what would trigger it, when it would be conducted, by whom or how, or with what consequences.

The Model Act directs that the Board shall “establish and administer a system that timely considers and decides appeals by applicants found ineligible for legal representation at public expense, or from decisions to provide only limited scope representation.”⁷² It provides no further direction. It does not provide for review of decisions to grant legal aid (such as might interest the funding authority or the adversary party).

D. POLICY DECISIONS LEFT TO THE STATE ACCESS BOARD

The State Access Board must make several important policy decisions left unanswered in the Model Act: how much legal aid is enough, what kinds of litigation legal aid may be used for, and

69. *Id.* at §3.B.i.

70. *Id.*

71. *Id.* at §3.B.i.

72. REPORT, *supra* note 13, at § 4.E.iii.

what kinds of lawyers—private practitioners or legal aid organization lawyers—should provide representation.

1. HOW MUCH LEGAL AID IS ENOUGH?

In many cases civil litigation for sums under \$100,000 is economically untenable.⁷³ That amount is twice the U.S. median family income. In such cases parties who have to bear their own lawyers' fees, often do not even bother bringing lawsuits. If they do sue, they may eschew use of expensive discovery procedures. Most commonly, if they sue, they settle before trial with the costs of trial as much in mind as the rights of their claims. They must shepherd their funds. Should legal aid recipients be better off than non-recipients?⁷⁴

The Model Act gives only a few hints as to how much legal aid parties in such cases should get. It provides for such assistance "as necessary for the person to obtain fair and equal access to justice."⁷⁵ It anticipates levels of assistance ranging from "full legal representation," through "limited scope representation," down to "self-help assistance" (for pro se litigants).⁷⁶ Determination of what is sufficient is left to the decision of the administrators of the program based on criteria set forth in the Model Act and in implementing regulations and policies. To conserve resources, the lesser levels are to be preferred whenever sufficient to ensure that basic human needs are not jeopardized. If, however, the other side in the dispute is represented by a lawyer, the limitation to "limited scope representation" is not to apply.⁷⁷

The Model Act leaves unanswered just what these concepts mean. Section 2C defines "full legal representation" to be "the

73. See JAMES R. MAXEINER, ET AL., FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE (2011); James R. Maxeiner, *The American "Rule": Assuring the Lion His Share*, COST AND FEE ALLOCATION IN CIVIL PROCEDURE: A COMPARATIVE STUDY (Mathias Reimann ed. 2011) (explaining why many American lawsuits are economically untenable).

74. Cf. *Turner v. Rogers*, at 14 (noting the "asymmetry" that might result where one side has court-appointed counsel and the other does not).

75. REPORT, *supra* note 13, at § 3.A.

76. The first two are defined in §§ 2 and 3.A. The third is undefined.

77. *Id.* at § 3.B.iii.

performance by a licensed legal professional of all legal services that may be involved.”⁷⁸ Does that permit a legal aid lawyer to invest without limit in discovery, expert witnesses or other ancillary services in the case?”⁷⁹

The question of extent of representation is a potential time-bomb that could undermine granting legal aid to the poor. If both sides have modest resources, but only one has unlimited legal aid, the aided party will have unfair advantage such as legal aid is intended to avoid.⁸⁰ Critics of legal aid may seize on those advantages to challenge its very existence. Even where that question is not present, how much legal aid is given will directly impact the amounts of money needed to pay for legal aid representation.

We surmise that the Model Act does not deal with this issue because its drafters anticipated that the organizations that provide the legal aid would make these decisions, much as they often do today. The new system needs to address this concern. On the one hand, if legal aid is a right, and not charity, then the providing organizations no longer will have the freedom to determine the extent of representation themselves. Will a recipient be able to require trial?⁸¹ On the other hand, addressing the issue is a prerequisite to establishing a system based on regular lawyer representation.

The Model Act opens the door to a reorientation of legal aid in America from a focus on providing counsel to a focus on access to justice. Providing counsel often may be a more expensive form of legal assistance. Other forms of assistance might be more effective. These might include partial assistance with counsel fees. or

78. *Id.* at § 2.C.

79. The spirit of the Model Act anticipates that the state will cover at least some ancillary services when it says that the right to public legal services includes “translation or other incidental services essential to achieving this goal [of fair and equal access to justice].” *Id.* at § 3.A.

80. This was an issue for legal aid in Germany in its early days nearly two centuries ago. See Linde, *supra* note 29.

81. Cf. James Gordley, *The Meaning of Equal Access to Legal Services*, 10 CORNELL INT’L L.J. 220, 223 (1977) (“The staff attorney ... can be given a measure of discretion in rationing aid among potential recipients which no private lawyer is in a position to exercise.”).

making court procedures more receptive to *pro se* representation. The end result could be to provide access to justice to a larger universe of recipients.⁸²

2. SHOULD LEGAL AID EXTEND TO LAWSUITS SEEKING CHANGES IN LAW?

Another political time bomb is whether the right to legal aid will include a right to pursue instrumental goals of creating law and asserting public law rights. Seeking change in the law was one goal of the legal aid movement of the 1970s.⁸³ It was a “missionary effort.”⁸⁴ The outcome of litigation was and sometimes still is intended to affect more than just those parties immediately before the court. Those parties immediately before the court, who in ordinary cases would control the litigation, may have a merely nominal role. Others behind them may control the case. How should this affect how much legal aid the nominal parties receive, if any? Such use of legal aid funds has been at the heart of controversy over the funding of the federal Legal Services Corporation since the 1970s.⁸⁵

3. WHO SHOULD PROVIDE LEGAL AID: PRIVATE ATTORNEYS OR LEGAL AID STAFF LAWYERS?

The Model Act, according to the Commentary to Section 4, would permit Boards “to contract with local non-profit legal aid organizations or with private attorneys, or both, as it deems appropriate....”⁸⁶ Although the Act does not explicitly state who will provide services, it seems to anticipate that services will be provided through bulk arrangements, i.e., through legal aid organizations and contract attorneys engaged in multiple

82. Although in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), the Court did not speak in terms of levels of legal assistance, or in terms of modification of the concept of court-provided counsel, it did take a step in that direction, when it looked for a more general assessment of whether the indigent litigant received “substitute procedural safeguards.”

83. See, e.g., Bamberger, *supra* note 19, at 209-10; Gordley, *supra* note 81, at 226.

84. *Id.* at 230.

85. See Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J.L. & PUB. POL’Y 571, 579-591 (2011).

86. *Id.*

representations. It is loosely enough drafted, however, to permit mechanisms that would allow applicants to choose their own lawyers.

II. AMERICAN LEGAL AID FROM A FOREIGN PERSPECTIVE

Americans have grown so accustomed to *not* providing legal aid to the disadvantaged, that many no longer question the injustices that it produces.⁸⁷ Whereas once America led the world in providing justice to its people, today it lags badly. To state that in traditional academic terms fails to convey adequately how retrograde we are. We resort here to a different technique used for more than four centuries: a dialogue between a common lawyer (here an American common lawyer) and a European civil lawyer.⁸⁸

When an American lawyer tells a European lawyer there is no right to legal aid in the United States, he is likely to get much the same response as he might get if he were to tell her that we imprison people for debt: polite consternation.

European	Surely, you must be kidding. This is the 21st century, not the 18th.
American	No. It's true. NO RIGHT IN THE UNITED STATES TO LEGAL AID
European	You don't have anything like Article 47(3) of the Charter of Fundamental Rights of the European Union? It states: "Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective

87. Cf. *infra* discussion part IV.A.2.

88. See, e.g., CHRISTOPHER SAINT GERMAN, THE DIALOGUES IN ENGLISH BETWEEN A DOCTOR OF DIVINITY AND A STUDENT IN THE LAWS OF ENGLAND, NEWLY CORRECTED AND IMPRINTED WITH NEW ADDITIONS (1575), SAINT GERMAN'S DOCTOR AND STUDENT: EDITED FOR THE SELDEN SOCIETY BY T.F.T. PLUCKNETT AND J.L. BARTON (Theodore Frank Thomas Plucknett, J.L. Barton eds., 1974); RUDOLF B. SCHLESINGER, COMPARATIVE LAW: CASES—TEXTS—MATERIALS 201 (2nd ed. 1959; 7th ed. 2009); Myron Moskowitz, *The O.J. Inquisition: An American Encounter with Continental Criminal Justice*, 28 VAND. J. OF TRANSNAT'L. L. 1121 (1995).

- access to justice.”⁸⁹
- American Nope.
- European Don’t you have a guarantee of a right to a fair trial? Article 6 of our European Human Rights Convention—now sixty years old and applicable from Iberia to Siberia and not just in the European Union—provides that “[i]n the determination of his civil rights and obligations... , everyone is entitled to a fair and public hearing....”⁹⁰ It was not a big leap to read that as meaning that legal aid must be provided when necessary to a fair hearing.
- American Oh, yes. *Day in court* is what the public talks about. Lawyers call it *due process*. We guarantee due process. Everyone gets to have a lawyer.
- European OK. Everyone gets a lawyer, even if he can’t afford one?
- American Oh. No. Somebody has to pay the lawyer. If you can’t pay, maybe a friend will.
- European I guess common law countries don’t get it. In 1979 the European Court of Human Rights had to tell Ireland that that it must provide legal aid in civil cases.⁹¹
- American We get it. Our Supreme Court has held that the state must provide legal aid in a civil case where the defendant’s custody is at stake.
- European Huh? You mean, if you wind up in prison? We are not talking about criminal cases.
- American Yes. Custody can occur: prison or perhaps an asylum. If custody is not at stake, there is no right to counsel. But there is a right to defend yourself *pro se*. I hear that in some places, like in Germany, you must have a lawyer.
- European That’s right. In Germany, if the case involves more than €5,000, you have to have a lawyer. It makes

89. 2010 O.J. (C 83) 2.

90. Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222. art. 6, § 1.

91. *Airey v. Ireland*, 2 Eur. Ct. H.R. (ser. A) at 305 (1979).

proceedings run more smoothly and protects parties' rights

American

And if you cannot afford a lawyer, you lose?

European

No. You can pick your own lawyer; legal aid pays the lawyer and over the following 48 months you repay the lawyer what the court determines you are able to pay and anything more the state covers. Of course, if you win the case, the losing party pays it all.

LEGAL AID AS PILLAR OF THE RULE OF LAW

American

That's practically socialism, or at least some of my more conservative friends would say so. We Americans don't go for the "social" market economy that you Europeans like so much.

European

Are you kidding? It's not charity. Legal aid in litigation is more than just social help. Many places without social market economies have legal aid for litigation. Why, France and Germany had litigation aid a century before they had social market economies. Litigation aid is a pillar of the rule of law. It is about your right to be heard: i.e., what you Americans call your 'day in court.' Without legal aid, many people cannot be heard.

American

What do you mean?

European

Because we have civil procedure, we prohibit self-help. If you think you are right, if the other party does not freely concede that, you go to court. You don't go over to his house and beat him up until he pays. That's what civilized society is about.

American

OK. We have courts for that purpose, too. The aggrieved go there.

European

And if they have no money?

American

They could have a problem.

European

Doesn't that mean you have one law for the rich and another for the poor. What became of equal justice under law?⁹²

92. Cf., REGINALD HEBER SMITH, JUSTICE AND THE POOR 29 (3rd ed. 1924) (then our

APOLOGIES FOR THE AMERICAN SYSTEM

- American It's not such a big problem. Litigation is only part of the law. It protects against the government. If the government were to try to take away my right to free speech, you can be sure that I would get help from the American Civil Liberties Union or someone like that. Were the government to try to take down my advertising billboard, somebody like the American Enterprise Institute would help me. In either case, the news media, on the left or on the right, would bring my case to the attention of the country. I do not worry. My rights are protected.
- European What if it's not a political issue or particularly interesting for the media? What if it is an issue between private parties?
- American It's still not a big problem. If the claim is small—typically under \$5,000—I can go to small claims court without a lawyer. If it is strong case and big—over \$100,000, or better over \$1 million—I can get a “plaintiff's lawyer” who will represent me without charge and will take the fee from the winnings. If it is a claim that many people have, I can get a “class action” lawyer to take the case for all of us.
- European And if the claim is not small enough for small claims court and not big enough for a contingent fee and not repetitive enough for class action, are you out of luck?
- American By no means. I can ask a legal aid society or a law school clinic to help me out.
- European Will they help you?
- American Honestly?—probably not. They have more pressing matters. They help first people with basic human needs, like their jobs, or their homes or their family rights.

Bill of Rights might just as well have read: “Every subject who can furnish a bond for fifteen or seventy-five dollars ought to obtain justice freely, completely, and without delay; to all others the courts are closed.”).

- European Then you have lost your day-in-court, and with it, your case, haven't you?
- American No. I can still represent myself.
- European OK. But you are a lawyer and a well-educated person at that. Fine help a right of self-representation is for anyone else. Do you mean to tell me that in your adversary system, where the judge is passive, someone without a lawyer has a chance against someone with a good lawyer?
- American,
conceding Of course not. In the United States we say—only partly in jest—that the party with the better lawyer ought to win. Chances for someone without lawyer are not good. But we are working on making help available so people can represent themselves better. That is a part of the ABA Model Access Act. Moreover, if the Act is adopted, if the case involves a “basic human need,” then the litigant will get not just assistance in self-representation, but full representation.
- European,
*voicing
amazement* So if I get cancer and I can't afford a surgeon and a hospital, you would teach me how to operate on myself at home? You would give me a surgeon and an operating room only if it is a life-threatening condition?”
- American,
indignant Now come on: let's not go off the deep end. Law is not like health. We all know that there are a lot of legal rights that you can't enforce in court. Lawsuits are expensive matters: most people cannot afford them for most matters. Think of most cases as cosmetic surgery. Do you really need a court to decide the case?
- European,
exasperated So some rights are not really rights to be enforced? So some people should not go to court to get their rights?
- American,
angry Get real. No legal system is perfect. Ours is about as good as they get. We Americans are legal realists: just because some rights are not worth enforcing, does not mean our legal system is a failure. How is it any different for you?

ROUTINENESS OF LEGAL AID

European,
lecturing

This is what makes the American discussion about legal aid perplexing to us Europeans. A right to legal aid in litigation is nothing new: original member states of the European Union have had it for well over a century. The aristocratic regime bestowed it; we did not need a social market economy to get it. Not all 47 member states of the Council of Europe—I won't name names, are known for their records for supporting human rights or social rights—but they have legal aid for litigation. Legal aid is nothing new or extraordinary; it is routine. Some five to ten percent of cases have legal aid. How can you get along without a right to legal aid?

American
European

We do.

Look. Doesn't the United States pay attention to its own international agreements? The International Declaration of Human Rights in Article 10 provides that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations...." That's the declaration that Eleanor Roosevelt sponsored.⁹³ Each year your Department of State reports on how well other countries have lived up to it. It may be time for you to do some self-reporting.

American
European

Maybe we should.

The United States led the world in realizing rights. What happened? When I read your declarations of rights, when I read your early writers on administration of justice, I feel at home. I feel we share values. But when I hear you talk about how things work—or do not work—in the United States, I shake my head in disbelief. What is the explanation?"

American

We just happen to have on our faculty someone

93. *See generally* MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

who knows about comparative law in historical perspective. I will ask him to give an explanation. He tells me, in brief, the reason is that in the United States the private bar controls the civil justice system. Legal aid is not high in its list of priorities.

III. LEGAL AID IN GERMANY

A. "THE LAW IS THERE FOR EVERYBODY"

Legal aid in Germany is an everyday part of the legal system. The Ministry of Justice of the state of North Rhine Westphalia explains matter-of-factly to potential recipients: "The law is there for everybody."⁹⁴ All people are equal before the law. Article 3 of our constitution says so. Therefore, no one should be forced by financial considerations to give up enforcement of her rights. Legal aid for both counseling and litigation is there to accomplish this."⁹⁵

The Code of Civil Procedure of 1877 made legal aid available nationally shortly after German unification in 1871. The Code and its system of legal aid remain in effect today as amended.⁹⁶ The principal changes in legal aid since 1877 have been in the funding basis (no longer is it based on mandatory pro bono representation) and in scope (it now extends to counseling as well as litigation). The latter was added in 1980 in a new "Law Concerning Legal

94. See NORTH RHINE WESTPHALIA MINISTRY OF JUSTICE, DAS RECHTS IST FÜR ALLE DA [The law is there for all] (2005), available at <https://services.nordrhein-westfalendirekt.de/broschuerenservice/download/105/DasRechtistfueralleda.pdf>.

95. JUSTIZMINISTERIUM DES LANDES NORDRHEIN-WESTFALEN, WAS SIE ÜBER BERATUNGS- UND PROZESSKOSTENHILFE WISSEN SOLLTEN [NORTH RHINE WESTPHALIA MINISTRY OF JUSTICE, WHAT YOU SHOULD KNOW ABOUT COUNSELING AND LITIGATION ASSISTANCE] 2 (2008), available at <https://services.nordrheinwestfalendirekt.de/broschuerenservice/download/16/prozesskostenhilfe.pdf> ("Das Recht ist für alle da. Alle Menschen sind vor dem Gesetz gleich. So bestimmt es Artikel 3 unseres Grundgesetzes. Niemand soll deshalb aus finanziellen Gründen gezwungen sein, auf die Wahrnehmung seiner Rechte zu verzichten. Um dies zu erreichen, gibt es die Beratungshilfe und die Prozesskostenhilfe.")

96. Zivilprozessordnung [ZPO] as amended through 24 September 2009.

Counseling and Representation for Citizens with Low Incomes”⁹⁷ and was accompanied by amendments to the legal aid provisions of the Code of Civil Procedure. We refer here collectively to these changes as the 1980 Reform Law.

Legal aid is a potential part of every lawsuit. It is available to everyone who might need assistance. It is not restricted to paupers. In one recent year, in the ordinary courts of first instance, depending on the court, one or more parties sought legal aid in seven to nine percent of cases. In family law matters legal aid involvement exceeded forty percent of cases.⁹⁸

The right to legal aid is a general one, unlimited by type of claim, claimant, or court.⁹⁹

Legal aid is not limited to just some types of claims, such as the “basic human needs” limitation of the proposed ABA Model Access Act.

Legal aid is not limited to certain types of claimants. It extends to legal persons, which by definition, cannot have basic human needs.¹⁰⁰ It extends to immigrants¹⁰¹ and to prisoners,¹⁰²

97. See Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen von 18. Juni 1980, BGBl I, at 689 [BerHG] [Law on Counseling and Representation of Citizens with Limited Incomes of June 18, 1980].

98. PETER GOTTWALD, ZIVILPROZESSRECHT BEGRÜNDET VON LEO ROSENBERG FORTGEFÜHRT VON KARL-HEINZ SCHWAB 464-65 (17th ed. 2010) [hereinafter GOTTWALD]. The figures are from 2007, where it was seven percent in the small claims courts of limited jurisdiction (*Amtsgerichte*) and nine percent in the courts of general jurisdiction (*Landgerichte*). Only in the latter courts is there is an obligation to use a lawyer. An earlier edition of the same text reported that in 1971, before the reforms, five percent of plaintiffs in the *Amtsgerichte* and seven percent of plaintiffs in the *Landgerichte* received legal aid. KARL HEINZ SCHWAB, ZIVILPROZESSRECHT BEGRÜNDET VON LEO ROSENBERG 459 (12th ed. 1977).

99. See generally SCHOREIT/GROB, *infra* note 104, at 123-25.

100. § 116 ZPO.

101. In the Code of 1877 foreigners had a right to legal aid only if their home states extended legal aid to Germans.

102. A particularly infamous inmate, Magnus Gäfgen, whose crime resembled that of the defendants in the famous American Leopold-Loeb murder case, was held entitled to legal aid to seek compensation for the conditions of his arrest and interrogation. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 19, 2008, 1 BvR 1807/07, available at http://www.bundesverfassungsgericht.de/entscheidungen/rk20080219_1bvr180707.html.

both of whom are often excluded in the United States from federal funding of legal aid.¹⁰³

Legal aid is available in all German courts, including the ordinary courts, the constitutional courts, the administrative courts, the labor law courts, the social courts, the patent court and the tax courts.¹⁰⁴ Legal aid is not, however, available in extra-judicial arbitration or mediation.¹⁰⁵ In this respect, the ABA Model Access Act is more progressive; it makes legal aid available in arbitration and thus recognizes the contemporary importance of alternative dispute resolution.¹⁰⁶

B. LEGAL AID IS INTEGRATED INTO THE COST SYSTEM

Legal aid in Germany is integrated into the cost system.¹⁰⁷ It requires no separate institutions. The courts determine applications for legal aid for litigants who appear before them.¹⁰⁸

103. REBEKAH DILLER AND EMILY SAVNER, A CALL TO END FEDERAL RESTRICTIONS ON LEGAL AID FOR THE POOR 11-12 (2009) available at <http://www.brennacenter.org/page/-/Justice/LSCRestrictionsWhitePaper.pdf>.

104. ELMAR KALTHOENER, HELMUT BÜTTNER & HILDEGARD WROBEL-SACHS, PROZESS- UND VERFAHRENSKOSTENHILFE; BERATUNGSHILFE 4, 9-10 (5th ed. 2010) [hereinafter KALTHOENER]; ARMIN SCHOREIT & INGO MICHAEL GROß, BERATUNGSHILFE PROZESSKOSTENHILFE VERFAHRENSKOSTENHILFE — BERH/PKH/VKH § 114, 12-125 (10th ed. 2010) [hereinafter SCHOREIT/GROß]. There are separate provisions for criminal defendants. Non-defendant participants in criminal cases may be entitled to legal aid.

105. KALTHOENER, *supra* note 104, at 6; SCHOREIT/GROß, *supra* note 104, § 114, at 124 (noting that where arbitration or mediation are conducted by the courts themselves, then legal aid is available).

106. See SECTION 3.A.

107. The Code Of Civil Procedure treats costs, security for litigation and litigation assistance in three successive titles; §§ 91-127a. ZPO.

108. The drafters of the Code of Civil Procedure of 1877 considered assigning the decision to grant aid to an independent body along the lines of the *bureau d'assistance* in France. They rejected that possibility because they saw it as too close to the administration of justice to entrust to a lesser authority whose decisions might not receive popular confidence. ENTWURF EINER DEUTSCHEN CIVILPROZESSORDNUNG NEBST BEGRÜNDUNG: IM KÖNIGLICHEN PREUBISCHE JUSTIZ-MINISTERIUM bearbeitet 289 (1871); see also NICOLO TROCKER, EMPFEHLEN SICH IM INTERESSE EINER EFFEKTIVEREN RECHTSVERWIRKLICHUNG FÜR ALLE BÜRGER ÄNDERUNGEN DES SYSTEMS DES KOSTEN- UND GEBÜHRENRECHTS?, GUTACHTEN B FÜR DEN 51. DEUTSCHEN JURISTENTAG B7, at B11 (1976). Accordingly, they directed it to the courts. They were not concerned about possible prejudice of the court deciding the petition, because their original proposal did not have a case merit test; the legislature

Ordinary lawyers provide representation.¹⁰⁹

Legal aid in Germany does not ordinarily provide legal representation.¹¹⁰ Instead, it adjusts the law of costs and security to facilitate access to justice.¹¹¹ This means that legal aid recipients are not restricted to a "poor man's lawyer."¹¹² They may choose the lawyers they wish to represent them.¹¹³

When a person consults a lawyer for the first time, if there is indication of financial need, the lawyer is obligated to mention legal aid.¹¹⁴ If legal aid is indicated, in the ordinary course the lawyer files application for legal aid on behalf of the client and indicates that the lawyer is the person's choice as lawyer.¹¹⁵ The lawyer may make application before the action is brought, or as part of the initiation of the suit.¹¹⁶ Commonly the lawyer bases the

added such a test later.

Apparently in practice the possibility of prejudice was not as great as the drafters of the 1877 Code had feared. In 1961 a law review commission revisited the issue. It considered two possible remedies: (1) establishing an independent authority to decide the issue; or (2) assigning a different judge to the case in the event that the reviewing judge denied the application for legal aid. The commission, however, thought that change was not necessary; experience had shown that judges deciding applications for legal aid did not lose their objectivity in further conduct of the case. *BERICHT DER KOMMISSION ZUR VORBEREITUNG EINER REFORM DER ZIVILGERICHTSBARKEIT. HERAUSGEGEBEN VOM BUNDESJUSTIZMINISTERIUM* 270-71 (1961).

By assigning the task to the court where the lawsuit is to be brought, both conflicts of interest and legal aid forum shopping are avoided. The possibility that the providers of legal aid would themselves make the decision, as is allowed under the ABA Model Access Act, does not seem to have been seriously discussed.

109. See Rudolf B. Schlesinger, *The German Alternative: A Legal Aid System of Equal Access to the Private Attorney*, 10 CORNELL INT'L L.J. 213 (1977).

110. *Id.* at 215.

111. See §§ 122-123 ZPO.

112. Schlesinger, *supra*, note 109 at 217.

113. *Id.*

114. KALTHOENER, *supra* note 104, at 50-51; EGON SCHNEIDER, *DIE KLAGE IM ZIVILPROZESS: TAKTIK—PRAXIS—MUSTER* 9-10, 185-88 (2000).

115. SCHNEIDER, *supra* note 114, at 188-90. Lawyers are not required to take clients under legal aid, but most do. Parties who wish to have legal aid authorized before visiting a lawyer may do so. They go to the clerk's office of the local court of limited jurisdiction (the *Amtsgericht*). They can give their applications orally to the clerks, who record them. § 117(1) ZPO. Clerks assist those parties who need help in making application.

116. Schlesinger, *supra* note 109, at 214.

application on a draft complaint. If the court grants legal aid, the lawyer represents the person under the terms of the legal aid law.¹¹⁷ If the court denies legal aid, the disappointed applicant must decide whether to go ahead with the lawsuit without legal aid.

If legal aid is granted, the representing lawyer is paid by the state, and has a direct claim against the state, but at a rate below the ordinary statutory rate.¹¹⁸ The court determines what fees probably will be before deciding the application. In the German system, it can do that with precision. Fees are regulated by law and are based on amounts in dispute.¹¹⁹ If legal aid is granted, the legal aid recipient is required to make forty-eight equal monthly co-payments to the state toward those amounts due.¹²⁰ The court determines the amount of the monthly co-payment by the fees to be incurred and ability to pay.¹²¹ Recipients' obligations to make co-payments cease when the total of all their payments made equals the liability for costs and fees, or after they have made 48 co-payments, whichever comes first.¹²²

Loser pays and legal aid. A court's decision to grant legal aid does not alter the general rule of German law that losers pay statutory costs and lawyers' fees of winners.¹²³ Accordingly, legal aid recipients who lose their cases must pay these expenses without aid. Moreover, they must pay judgments rendered against them. These litigation risks discourage suits by potential legal aid recipients. Nevertheless, proposals that legal aid should cover

117. § 121(1) ZPO. For simple matters where €5000 or less is at stake, a lawyer may not be needed. But if one is, the court must appoint the applicant's choice. § 121(2) ZPO.

118. Schlesinger, *supra* note 109, at 214. For example, if the amount in controversy is €5,000 (about \$7000), each fee unit is €219 instead of €301. Compare Rechtsanwaltsvergütungsgesetz [RVG] [Lawyers' Compensation Law], as amended to May 23, 2011, BGBl I at 898, § 49 (legal aid rate), with RVG § 13(1) and Anlage 2 [Annex 2] (normal rate, the Annex giving the rate in tabular form), available at <http://www.gesetze-im-internet.de/bundesrecht/rvg/gesamt.pdf>. A typical case might have two to five fee units.

119. RVG, *supra* note 118, §2.

120. *Id.* at § 115(2).

121. *Id.*

122. *Id.*

123. *Id.* at § 123.

recipients' adversary attorneys' fees have not been adopted.¹²⁴

The risks of loser fee-shifting are not as high in Germany as they would be in the United States. German statutory fees for both sides combined are typically less than legal fees for one side alone in the United States.¹²⁵ The litigation risk in Germany has the salutary effect of discouraging frivolous lawsuits.

The ordinary rule of loser pays indirectly supports German legal aid. The loser pays rules are altered to make special accommodations for legal aid cases. First, they provide that the lawyer for the winning party has a direct claim against the losing party.¹²⁶ The usual rule gives only the winning party that claim. Second, the claim against the losing party is not for the reduced legal aid rate, but for the full statutory fee.¹²⁷ This difference can be substantial for middle-to-high value claims.¹²⁸ The result is, in effect, a modified contingent fee system for legal aid cases.

C. GERMAN SYSTEM OF LEGAL AID

1. ELIGIBILITY

Although legal aid is routine in Germany, courts do not decide whether a party is entitled to legal aid unless asked.¹²⁹ It is up to each party wishing for legal aid to apply for it. Not every party qualifies.¹³⁰ As has been proposed in the ABA Model Access Act, to obtain legal aid in Germany requires proof of economic need and of case merit.¹³¹ There is separate consideration of appeals.¹³²

124. GOTTWALD, *supra* note 98, at 477, margin No. 73.

125. See MAXEINER *ET. AL.*, *supra* note 73, at 241-45.

126. § 126(1) ZPO.

127. Schlesinger, *supra* note 109, at 216; SCHOREIT/GROß, *supra* note 104, at 270.

128. § 126(1) ZPO. The victorious aided-party's claim is not, however, lost. SCHOREIT/GROß, *supra* note 104, at 271 (with further references). In the absence of legal aid, only the victorious party and not that party's lawyer, has a claim against the loser. In the American system, if the legal aid lawyer has received federal funding, the lawyer is prohibited from seeking fees from the opposing party.

129. Schlesinger, *supra* note 105, at 213-14.

130. *Id.*

131. *Id.*

132. § 119 ZPO.

Economic need. The present formulation of economic need has been in effect for 30 years; it was adopted by the 1980 Reform. Its predecessor had been in effect for over one hundred years; it was part of the original Code of Civil Procedure of 1877.¹³³ The two formulations are similar.

Both the 1980 test and the 1877 test before it moved the law in the same direction: from considering legal aid as charity to seeing it as an essential element of legal process and as a legal right for recipients.¹³⁴ Both expanded the circle of assisted persons by making the need criterion more dependent on individual circumstances of particular applicants in specific cases and less on wealth. While individualizing the criterion for eligibility, both statutes made standards more objective and increased the role of independent judges in applying them. Both increased the responsibility of recipients to contribute to their own aid.

Since the 1980 Reform, the Code of Civil Procedure has provided that a party¹³⁵ has a right to legal aid if “according to her personal and economic circumstances she cannot meet the costs of the litigation or only in part or in installments.”¹³⁶ The costs referred to are the party’s own upfront expenses in prosecuting the action, i.e., court costs, lawyer’s fees and expenses of taking testimony (e.g., advances for experts and other witnesses).¹³⁷ They do *not* include expenses that the party *might* have to pay, e.g., enforcing a judgment, taking or contesting an appeal, or paying the costs, fees and expenses of the other side should the assisted party lose the case.

Legal aid is available to the public at large. Poverty is not

133. Mauro Cappelletti & James Gordley, *Legal Aid: Modern Themes and Variations: Part One: The Emergence of a Modern Theme*, 24 STAN. L. REV. 347, 356 (1972).

134. *Id.*

135. Other persons involved in the case who are not formally parties may be entitled to legal aid under another law governing legal aid for counseling. 2 STEIN/JONAS, KOMMENTAR ZUR ZIVILPROZESSORDNUNG, § 114 II 2. a), 716-17, margin No. 3-4 (22nd ed. 2004) [hereinafter STEIN/JONAS].

136. “[D]ie nach ihren persönlichen und wirtschaftlichen Verhältnissen die Kosten der Prozeßführung nicht, nur zum Teil oder nur in Raten aufbringen kann . . .” § 114 ZPO.

137. KOMMENTAR ZUR ZIVILPROZESSORDNUNG MIT GERICHTSVERFASSUNGSGESETZ § 115 ZPO, margin No. 56 (Hans-Joachim Musielak ed., 7th ed. 2009).

required. Eligibility depends on the difficulty of this individual applicant funding this particular case. Many people of low-to-middle incomes qualify for legal aid and even people of high incomes who have high value claims or many personal expenses do. Today lawyers rightly tell potential clients that legal aid is “not just for the poor.”¹³⁸ They no longer call legal aid “Paupers’ Law” (*Armenrecht*), but “Litigation Cost Assistance” (*Prozesskostenhilfe*).¹³⁹

Case merit. Since the 1877 Code of Civil Procedure, applicants have had to show that their cases have merit.¹⁴⁰ Unlike the rule that prevailed in some states in Germany in 1877 (and in New York then),¹⁴¹ the poor do not have to obtain from lawyers or officials prior endorsements of the validity of their claims. It is sufficient for them to present facts to judges, which, if true would support their claims. Judges make the determinations. Their review is typical of German civil proceedings generally, where the maxim prevails: “give me the facts, and I will give you your right.”¹⁴²

Review of the merits of claims protects the state treasury and the court from funding and conducting lawsuits with little chance of success. It protects potential opponents from lawsuits where the other side has diminished concern for costs.¹⁴³ It also, however, saves applicants from their own misjudgments. Review

138. See, e.g., G. Kaß, “Prozesskostenhilfe—nicht nur etwas für Arme” <http://www.ra-kassing.de/pkh/allg.htm> (last visited Nov. 8, 2011).

139. Cf. Jörg Rahmeda, *Vom Armenrecht zur Prozesskostenhilfe*, [1979] JURISTISCHE RUNDSCHAU [JR] 492.

140. At first blush, such a review might seem to contradict the constitutional premise that the poor should have the same access to courts as the prosperous. The rich are allowed to bring pointless lawsuits. Should not also the less well-off? The constitutional command does not, however, go so far. Poor and rich do not have to be treated exactly the same; it is enough that all are on the same plane. See Philippi, *supra* note 29, at 268. The court’s review for prospects of success in effect puts the less well-off on the same plane as wealthy litigants who “reasonably” take into account process risks. KALTHOENER, *supra* note 104, at 147.

141. See 1 HAHN, DIE GESAMTEN MATERIALIEN ZUR CIVILPROZESSORDNUNG UND DEM EINFÜHRUNGSGESETZ ZU DERSELBEN VOM 30. JANUAR 1877. AUF VERANLASSUNG DES KAISERLICHEN REICHS-JUSTIZAMTES 207 (1880) (for Germany), 2 N.Y. REV. STAT. Chap. VIII, Title 1, § 2(2) at 445 (1829).

142. MAXEINER ET AL, *supra* note 73, at 105.

143. STEIN/JONAS, *supra* note 135, at 724, margin No. 21.

prevents at least some foolish lawsuits, where if lost, aid recipients would have to pay the winning parties' costs.¹⁴⁴

The arguable merit criterion in its present formulation predates the 1980 Reform.¹⁴⁵ It directs that legal aid is to be granted if "the intended action or defense offers a sufficient prospect of success and does not appear to be capricious."¹⁴⁶ The courts have construed this formulation in favor of applicants. It does not require that applicants show probability of success.¹⁴⁷ It is satisfied that they raise claims or defenses that are "reasonably arguable" (*vertretbar*).¹⁴⁸ Reviews are summary; they are not to place excessive demands on the showing.¹⁴⁹ The decision granting legal aid is intended to make legal process available; it should not substitute as an early decision of the case.¹⁵⁰ If the claim is dependent on resolution of a disputed question of law, the court should authorize legal aid so that the applicant can present the issue fully.¹⁵¹ It is constitutionally impermissible for the court to decide that question in the application.¹⁵² Similarly, if the claim is dependent on credibility of admissible testimony, then the court should authorize aid.¹⁵³

German courts have an easier time reviewing legal aid

144. Cf. BECK'SCHE RICHTER HAND-BUCH, at A I, page 6, margin No. 13 (2nd ed. 1999) (citing Klaus Dresenkamp, *Prozeßkostenhilfe*).

145. The 1980 Reform deleted the example of capriciousness that was previously included in § 114 ZPO.

146. § 114 ZPO.

147. STEIN/JONAS, *supra* note 135, at 724, margin No. 22; KALTHOENER, *supra* note 104, at 147, margin No. 409.

148. *Id.* at 724, margin No. 22. The standard is reminiscent of language in Rule 11 of the Federal Rules of Civil Procedure.

149. KALTHOENER, *supra* note 104, at 148, margin No. 410.

150. *Id.* at 724. Taking evidence of witness and experts is foreclosed. § 118 II ZPO.

151. See KALTHOENER, *supra* note 104, at 148-49, margin No. 411-12.

152. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Decision of April 7, 2000, 1 BvR 81/00, available at http://www.bundesverfassungsgericht.de/entscheidungen/rk20000407_1bvr008100.html.

153. See KALTHOENER at 149-50, margin No. 413-14. A generous application of the standard is practically compelled in German ordinary courts of first instance of general jurisdiction (the *Landgerichte*), where representation by lawyers is compulsory. To deny legal aid in those courts can be tantamount to denying the right to be heard. Cf. *id.* at 148, margin No. 409.

applications for prospects of success than would American courts. German pleadings are fuller than are American pleadings and are automatically reviewed by the courts in every case including those where there is no application for legal aid. In many legal aid cases, applications are made by lawyers and include draft complaints or answers. German pleadings are required to set out the facts of the case in detail and to identify the evidence that proof of the complaints will rely on.¹⁵⁴

Success refers to legal success in asserting the claim. Thus, the determination of prospects for success is unaffected by a finding that judgment could not be enforced. Whether a claim is practically worth bringing is not a factor under review of the claim's prospects for success, but can be the basis for disqualification on the ground that the claim appears to be brought "capriciously" (*mutwillig*).¹⁵⁵ The principal test of capriciousness is whether a person who did not require legal aid would bring it.¹⁵⁶ For example, a claim is brought capriciously if it is brought for the full amount, when the debtor would voluntarily pay all but a part.¹⁵⁷ Legal aid, it is said, is not intended to allow needy persons to bring lawsuits that well-off people would not bring.¹⁵⁸

Appeals. Each court determines eligibility for its own proceedings. If a party appeals a case, the party must make a separate application for legal aid for the appeal to the appellate court.¹⁵⁹ The appellate court determines for itself whether legal aid criteria are met.

2. PROCEDURE

How deciders decide. The application proceeding is between

154. See MAXEINER *ET AL*, *supra* note 73, at 105-07.

155. KALTHOENER, *supra* note 104, at 152; 1 MÜNCHNER KOMMENTAR ZUR ZIVILPROZESSORDNUNG, § 114, at 843, margin No. 65, 849, margin No. 87 (Thomas Rauscher, Peter Wax & Joachimi Wenzel eds., 3rd ed. 2008).

156. It was explicitly defined in the law as it stood in 1980. *Supra* note 137, § 114, at 512, margin No. 30 (citing the legislative history and a recent case).

157. GOTTWALD, *supra* note 98, § 87 III. 3, at 470, margin No. 34.

158. *Supra* note 137, § 114, at 512, margin No. 30.

159. § 119(1) ZPO.

the applicant and the state. It is separate from the litigation, but it is conducted by the judge in the litigation.¹⁶⁰ It is a simplified proceeding. The party seeking legal aid, even in a court that requires attorney representation, need not use an attorney. The examination of the application is summary;¹⁶¹ there is no hearing. The proceeding is to be expedited.¹⁶²

Legal aid presents some possibility for tactical maneuvering in lawsuits. German lawyers can test the strength of their cases with judges by first filing for legal aid.¹⁶³ There is no cost risk associated with denial of an application for aid.¹⁶⁴ German lawyers do not seem to be concerned, as their American counterparts might be, that such applications disclose too much of their case too soon to the other side.

Applicants need not apply in writing; they may apply orally to a court clerk, who records it in writing.¹⁶⁵ The application is to include a statement of the matter in dispute, the expected proof, and a personal statement of income and property of the applicant together with appropriate documentation.¹⁶⁶ The former is to show the arguable merit of the lawsuit; the latter is to show the personal need of the applicant.

Even with prescribed forms and court clerk assistance in filling them out, applying for legal aid can be challenging. The two-page financial form looks something like an American federal tax form and can create similar problems.¹⁶⁷ A leading legal aid

160. §§ 118, 127(1) ZPO.

161. SCHOREIT/GROß, *supra* note 104, §114, at 128, margin No. 36.

162. GOTTWALD, *supra* note 98, § 87, at 474, margin No. 49; SCHOREIT/GROß, *supra* note 104, § 114, at 128, margin No. 36.

163. Dresenkamp, *supra* note 144, at 4, margin No. 5.

164. § 118(1) ZPO; SCHOREIT/GROß, *supra* note 104, § 118, at 201-203, margin No. 34-45.

165. § 117(1) ZPO.

166. § 117(1) (2) ZPO.

167. The form is *available* at the common website for the state and federal ministries of justice, Justizportal des Bundes und der Länder, <http://www.justiz.de/index.php>, under Formulare, first listing, *Anlage zum Antrag auf Bewilligung der Prozesskostenhilfe*. The form requires:

(a) Applicant's name, address, occupation, personal information and the name of the legal representative.

textbook for practitioners devotes ten pages to explaining entering income, fourteen pages to subtractions from income and five pages to applying the table to the result.¹⁶⁸ And that does not yet take into account applicants' assets. It is no wonder that the authorities welcome lawyers filling out the forms for prospective legal aid clients. Where a lawyer makes the application for the applicant, typically the lawyer establishes the merit of the case using a complaint drafted for its eventual filing.¹⁶⁹

In routine cases applicants present completed "Declarations of personal and financial circumstances"¹⁷⁰ with supporting documentation. The information provided determines how much money applicants are deemed to have available to meet litigation expenses. A table prescribed in the law determines how much of available resources the applicant must devote monthly to the lawsuit. The courts are said to apply these provisions generously to the benefit of applicants.¹⁷¹

(b) Declaration whether legal insurance or other person (e.g., labor union) covers the costs.

(c) Whether the applicant receives support from parent, separated or divorced spouse, or other person.

(d) Applicant's dependents and the incomes of dependents.

(e) Gross income of applicant and spouse in seven categories (employment, self-employment, rental, stock, social payments for children, social payment for housing, and other).

(f) Deductions of applicant and spouse for taxes, social insurance, other insurance and business expenses.

(g) Statement of property in five categories (real estate, building fund, bank accounts, vehicles and other).

(h) Residence size and expenses, including rent or mortgage payments and heating costs.

(i) Other payment expenses.

(j) Special burdens (e.g., physical disability expenses).

168. KALTHOENER, *supra* note 104, at 74-84, 84-98, and 98-103.

169. GOTTWALD, *supra* note 98, § 87, at 473, margin No. 43; SCHOREIT/GROß, *supra* note 104, §117, at 188-89, margin No. 6.

170. *Erklärung über die persönlichen und wirtschaftlichen Verhältnisse*. The Code of Procedure authorizes the Federal Ministry of Justice to issue such forms for use in all states. § 117(c) ZPO. The forms adopted require approval of the upper house of the legislature (where states are represented). Use of issued forms is mandatory. § 177(d) ZPO.

171. KALTHOENER, *supra* note 104, at 72.

Court costs and lawyers' fees are readily projected once the amount in dispute is known. In any event, however, because legal aid in principle is extended as an advance and not as an outright grant, the exact amount of expenses to be incurred rarely determines the decision to authorize legal aid. The precise costs and lawyers' fees are set in a final judgment.¹⁷² The Federal Ministry of Justice is authorized to, and has, issued regulations and forms to simplify the application.¹⁷³

Right to be heard. Although courts are to consider application in expedited proceedings, they must provide applicants and the financing state authorities, with their right to be heard. The court can require that applicants provide support for factual claims. Courts are to consider the likelihood of success and the possibility of bad faith, but their reviews are not to supersede actual lawsuits. Normally courts do not hold hearings and usually do not call witnesses to determine eligibility. They are to reserve all disputed issues of fact and law for regular proceedings.¹⁷⁴ When courts deny legal assistance, they must provide written explanations for denial.¹⁷⁵

Adversary's right to be heard. Strictly speaking the application for legal aid is a matter between applicant and the state, but the other party to the lawsuit has a practical interest in the outcome of that decision. If legal aid is granted, the recipient will be enabled better to conduct the lawsuit. There is risk that the very legal aid that the state provides to assure that the recipient is not disadvantaged ("equality of arms" — *Waffengleichheit*), gives the recipient an advantage. For as long as German law has recognized the need to provide equality of arms, German jurists have worried that legal aid will disadvantage the other side.¹⁷⁶ To fend off such a result, the legal aid law gives the other side an opportunity to be heard on the granting of legal aid.¹⁷⁷

172. See §§ 91 *et seq.* ZPO.

173. § 117(3) ZPO.

174. This paragraph follows GOTTWALD, *supra* note 98, § 87, at 474-75, margin No. 49-53.

175. § 127(1) ZPO.

176. See Linde, *supra* note 29.

177. § 118(1) ZPO. Besides the obvious vexation of lawsuits, another concern of al-

The other side does not become a party to the application proceeding and is not served with the applicant's application. The other side is, however, informed of the application, is provided with a copy of that portion of the application related to the claim, and is given an opportunity to take a position on whether the underling claim has a sufficient prospect for success and is not made capriciously. On privacy grounds, the other side is not given a copy of the needs-side of the application and is not permitted to comment on the applicant's need for assistance.¹⁷⁸

3. EXTENT OF LEGAL AID

Determining the extent of legal aid is usually simple and formulaic since it is integrated into the cost system as a whole. Fee tables determine reimbursable court costs and lawyers' fees in all cases.¹⁷⁹ Legal aid modifies the amounts and procedures somewhat, but remains anchored in the general cost law.

The German legal system provides for judicial control of evidence-taking, fee limitation and shifting of costs to losing parties and thus avoids many opportunities for misuse of legal aid that may arise in the American system.

Judicial control of evidence-taking largely precludes one side from imposing on adversaries costs of testimony that do not relate directly to the case under consideration. Fee regulation maintains proportion between case investment and case outcomes. Fee-shifting substantially reduces opportunities for aided parties to gain advantages over unaided parties.

The authorization of legal aid transfers permanently the aided party's obligations for future court costs, lawyers' fees and other expenses to the state treasury and for past such debts to the extent that they have not already been paid. The aided party is also excused from providing security for subsequent costs. The appointed lawyer is prohibited from making claims for fees against

lowing parties to proceed with weak claims relying on legal aid is that they will be unable to satisfy judgments for costs and fees when they lose.

178. Dresenkamp, *supra* note 144, at 5, margin No. 9.

179. See generally RVG *passim*.

the aided party.¹⁸⁰ Expenses are determined in the litigation. They include the travel costs of the aided party in attending court.¹⁸¹

Successful applicants ordinarily are obligated to make forty-eight monthly co-payments beginning immediately. The size of the monthly co-payment depends on their ability to pay and not on costs, lawyer's fees and expenses of the lawsuit to be incurred. Courts rely on data submitted by applicants to determine how much money applicants have available. Should they find that applicants have no ability to co-fund lawsuits, i.e., less than €15 a month (about \$20), they are to direct legal aid without co-payments. If the amount available is above €15 monthly, applicants must make monthly co-payments.¹⁸² The amount of the monthly co-payments are determined by the amounts available and not by the amounts of the anticipated expenses. So long as the available amount is below €750, the required payments are in the range of about 30 to 40% of the amount available. Above an available amount of €750, the required payment is €300 plus the entire amount available above €750.¹⁸³

Recipients obligated to make monthly payments must continue to make the payments until they have paid all costs, fees and expenses or until they have made forty-eight payments, or until they are excused on further application. The state absorbs costs, lawyers' fees and expenses in excess of forty-eight payments.¹⁸⁴

The monthly payment system brings more predictability and consistency to legal aid decisions than had existed before. It regularizes determination of need. In most instances there is no need to apply an indefinite standard. It also moderates the consequences of eligibility decisions. Errors in decisions do not have the dire consequence of precluding participation altogether, but only result in somewhat higher (or lower) monthly co-

180. § 122(1) ZPO.

181. GOTTWALD, *supra* note 98, at 475, margin No. 59.

182. If projected litigation expenses would be less than four co-payments, legal aid is not available.

183. § 115 ZPO.

184. *See* §§ 115, 122 ZPO.

payments. The monthly payment system makes many grants of legal aid self-funding. Better off recipients pay in full for the assistance they receive. Consequently the state can assist more applicants with the same funds. Less well-off recipients, including those making monthly payments, are still better off than they were under the old system, for under the old system, once the lawsuit concluded, they were required to repay all of the aid as soon as a court found that they were financially able to do so.¹⁸⁵

Applicants receive financial support rather than a lawyer as such. In cases where lawyer representation is mandatory (mostly cases in the courts of general jurisdiction, *Landgerichte*, where the jurisdictional minimum is €5000), the court automatically appoints a lawyer (of the party's choosing).¹⁸⁶ In cases where lawyer representation is not mandatory, in small claims courts and in some specialized courts, if the applicant requests a lawyer, the court will appoint a lawyer (and then of the party's choosing) either, if the circumstances of the case (i.e., complexity of claims, abilities of applicant) make a lawyer necessary or if the opposing party is represented by a lawyer.¹⁸⁷ The former serves the interest of justice; the latter assures the "equality of arms" between the disputing parties.¹⁸⁸

IV. AN HISTORICAL EXPLANATION FOR DIFFERENCES

Today there is a right to legal aid in Germany. There is none in the United States. Why?

History suggests an explanation: German civil justice is the product of public ministers while American civil justice is the product of private lawyers.¹⁸⁹ The former responded to the needs of

185. See generally BERNHARD MEIER, HAT SICH DIE PROZEBKOSTENHILFENOVELLE BEWÄHRT.

186. § 121(1) ZPO.

187. § 121(2) ZPO.

188. See GOTTWALD, *supra* note 98, at 475-76, margin No. 60-63.

189. Compare VOM REICHSJUSTIZAMT ZUM BUNDESMINISTERIUM DER JUSTIZ: ZUM 100JÄHRIGEN GRÜNDUNGSTAG DES REICHSJUSTIZAMTES (1977), with BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM (2010). For the development of the German Federal Ministry of Justice, see VOM REICHSJUSTIZAMT ZUM BUNDESMINISTERIUM DER JUSTIZ: ZUM 100JÄHRIGEN GRÜNDUNGSTAG DES REICHSJUSTIZAMTES (1977). For the lawyer domination of the U.S. system, see

the public; the latter answered the calls of their principals, minded their own needs and ignored the needs of those who could not pay.¹⁹⁰ A brief glance at the history of legal aid in both countries confirms the conclusion.

In the early nineteenth century conditions for legal aid in the United States and in Germany were similar.¹⁹¹ In those days much dispute resolution was conducted without close attention to formal legal texts and without formal procedures. In informal courts and in other venues parties represented themselves. Lawyers were not common; public support for representation was unheard of. Only a few courts used lawyers.¹⁹² Those courts that did, both in the United States and in Germany, made provision for the very poor in similar ways: exemption from court and lawyers' fees. They appointed lawyers to represent paupers for free and considered the free representation within the duties of lawyers as officers of the court.¹⁹³ In the United States this charity was known as proceeding *in forma pauperis*; in Germany it was called

BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM (2010).

190. There is no cynicism in this remark. Both followed the roles assigned by their respective professions. Suggestive of this conclusion is in the U.S. we debate court-provided counsel; abroad one debates access to justice.

191. For the American scene, see generally ANTON-HEERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA (2 vols. 1965); 2 THE CAMBRIDGE HISTORY OF AMERICAN LAW 68 (2009); GERARD W. GAWALT, THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840 (1979). For the German scene, see generally KENNETH F. LEDFORD, FROM GENERAL ESTATES TO SPECIAL INTEREST: GERMAN LAWYERS 1878-1933, 25-58 (1996); ERICH DÖHRING, GESCHICHTE DER DEUTSCHEN RECHTSPFLEGE SEIT 1500 (1953). For a comparative historical introduction with particular reference to right versus charity, see Mauro Capelletti & James Gordley, *Legal Aid: Modern Themes and Variations: Part One: The Emergence of a Modern Theme*, 24 STAN. L. REV. 347, 357-64 (1972).

German states imposed limitations on the number of lawyers. Prussia even tried to ban lawyers altogether and replace them with state officials. See LEDFORD, *supra* note 191, at 22-58.

193. The reformer Field rejected this characterization as office of the court. David Dudley Field's letter was printed as Appendix to the report of the Committee on the Judiciary, in relation to the more simple and speedy administration of justice. 5 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW-YORK SIXTY-FOURTH [SIC, 65TH] SESSION (1842) (citing STATE OF NEW YORK, REPORT IN PART OF THE COMMITTEE ON THE JUDICIARY, IN RELATION TO THE ADMINISTRATION OF JUSTICE, DOCUMENT NO. 81, 55 (1842)); FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING, CODE OF PROCEDURE 205 (1848).

Paupers' Law (*Armenrecht*). Today we would call it mandatory *pro bono*.

The nineteenth century brought enormous growth in commerce and industry in both the United States and Germany. Local economies became national ones. Rural societies became urban mass societies. Collections of states became nations. Demand for formal law, legal procedures and legal services grew exponentially. Responses were similar: more statutes to be applied in more rational and more effectively formal procedures; thus, the results were different. Particularly they were different for legal aid.

In Germany, the government had and has the leading role in providing courts and administering justice. The government had and has responsibility for maintaining a well-functioning society. Such a society is furthered by an effective rule-of-law that strives for social justice.¹⁹⁴ The government has control of tax revenues; it has power and authority to direct payments for legal aid to the poor.

In the United States, on the other hand, lawyers and judges are responsible for the courts. They do not have responsibility for administration of civil justice generally or for society as a whole. Their responsibilities are to their clients or, in the case of courts, to the parties that appear before them. Judges and lawyers do not control tax revenues. Judges do not without controversy direct government to spend public funds to improve courts or to pay lawyers' fees. Judges, who come from the practicing bar, do not without resistance from their former colleagues, direct lawyers to represent the poor for free.

Access to justice today in these two countries reflects those different conditions. In Germany it is understood that access to justice should be universal. Access is extended as a right to all—not just to the poor—when needed. In the United States, on the other hand, access to justice extends only to those who can pay the price of admission or who are lucky enough to receive charity.

194. See Grundgesetz [GG] [Basic Law = Constitution] Art. 20(1) (establishing that "[t]he Federal Republic of Germany is a democratic and social federal state").

Public support for litigation as a right remains unknown in civil matters.

A. UNITED STATES

In the first century of America's independence lawyers and judges took control of state legal systems from state legislatures.¹⁹⁵ They made sure that they could operate free of government regulation and mandatory *pro bono* work.¹⁹⁶ In the years since, although the bar has gone national, it has not addressed access to justice systematically. Its national organizations have sought many improvements, but making access to justice universal has not been among them. Bench and bar have forgotten the declarations of 1776. They have left the public to look out for itself. The result of their inaction on access to justice is an unsystematic mix of legal aid societies, contingent fee cases and self-representation in small claims and other courts. That mix leaves most of the needs of most people—including those of the poor—unsatisfied.¹⁹⁷

1. IN FORMA PAUPERIS

Here we assert an historical explanation grounded in experiences in New York. We hypothesize that the situation for access to justice in other states was largely similar or worse than in New York. That is a reasonable hypothesis. New York historically has been among the leading states in civil justice and in legal aid. New York's legislature in 1801 was an early adopter of *in forma pauperis* proceedings.¹⁹⁸ Only about half of the states followed suit.¹⁹⁹

195. See 2 CHROUST, *supra* note 191, Chapter V "Legislative and Judicial Attempts to Control the Legal Profession."

196. See John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBLEMS 9 (1984).

197. See DILLER & SAVNER, *supra* note 103 (estimating for the poor 80%).

198. See LAWS OF THE STATE OF NEW YORK (1st Vol. 1802). (Chap. XC. An ACT for the Amendment of Law, and the better Advancement of Justice, passed March 30th, 1801).

199. NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW: WITH OCCASIONAL NOTES AND COMMENTS 250 (7th Vol. 1824). A century later, about half of the states had no such procedure. John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 389-90 (1923).

Under New York's statutes judges and lawyers showed a Dickensian solicitude to applicants. In an 1828 decision New York's chancellor ruled, "the court must be convinced that the party is really an object of charity before it will grant him this privilege."²⁰⁰ The chancellor stood up for his colleagues' rights to their fees: "Applications of this kind are not to be encouraged in this state, where every healthy and industrious citizen can earn sufficient to support himself, and also to enable him to pay the moderate fees of the officers of this court."²⁰¹

To make matters worse, although the New York statute did not require it, the state's judges followed English practice and required that applicants be destitute: they could be worth no more than five pounds sterling, excluding only their wearing apparel and the subject of the controversy.²⁰²

The 1828 New York Revised Statutes—generally a forward looking work—wrote the English needs test into law: applicants could be worth no more in American currency than twenty dollars. With miserly generosity the Revised Statutes provided that applicants might exclude the value not only of the clothes on their backs, but the wearing apparel of their family as well as "furniture necessary for them."²⁰³ If that were not restrictive enough, the Revised Statutes added a case merit test that the socially-unconnected poor could not be expected to meet: they had to present a certification from a lawyer that he had examined their application and had found a good claim if the facts alleged were true.²⁰⁴

Contemporary commentary confirms that judges interpreted already miserly provisions with stinginess.²⁰⁵ They denied *in*

200. *Isnard v. Cazeaux*, 1 Paige 39, 40 (N.Y. Chancery 1828).

201. DAVID GRAHAM, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK 748-49 (1832); 915-16 (2nd ed. 1836) (quoting *id.*).

202. 1 JOHN DUNLAP, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF NEW YORK IN CIVIL ACTIONS, TOGETHER WITH THE PROCEEDINGS IN ERROR 35 (1821). The New Jersey Supreme Court opined that "five pounds sterling may be too small a sum, but there should be some limit." *Sears v. Tindall*, 15 N.J.L. 399, 403 (N.J. 1836).

203. N.Y. Rev. state. tit. 1, 2 (1829).

204. *Id.*

205. See 2 ALEXANDER MANSFIELD BURRILL, A TREATISE ON THE PRACTICE OF THE

forma pauperis status to whole classes of parties, including defendants, appellants and appellees, and plaintiffs who brought slander and other “vexatious” actions.²⁰⁶ On the ground of abuse prevention, they assigned lawyers to *in forma pauperis* cases lawyers different than those who prepared the applications.²⁰⁷ Small wonder that in 1885 one observer described *in forma pauperis* in New York as an “almost forgotten practice.”²⁰⁸

2. ABSENCE OF ACCESS TO JUSTICE FROM CIVIL JUSTICE REFORMS

The 1848 Code of Civil Procedure for New York, among the most significant reforms of American civil procedure ever, made no provision for the poor. It left unchanged and outside the code the *in forma pauperis* proceedings of the Revised Statutes.²⁰⁹ While it ignored the interests of the poor, it minded those of lawyers: it abolished all laws “establishing or regulating” ‘lawyers’ fees.’²¹⁰

By the 1870s, the legal profession was going national.²¹¹ Lawyers sought national responses to the needs of the modern era. Yet they left access to justice out of their national reform proposals. We tick off here some of the record of omission:

In 1878 reform-minded lawyers founded the American Bar Association. Not until forty years later did the Association address the issue of legal

SUPREME COURT OF THE STATE OF NEW-YORK WITH AN APPENDIX OF PRACTICAL FORMS 105 (2nd ed. 1846); *see also* AUSTIN ABBOTT, THE PRINCIPLES AND FORMS OF PRACTICE IN CIVIL ACTION IN COURTS OF RECORD UNDER THE CODE OF PROCEDURE 569 (1887).

206. *See id.* (citing cases). The United States Supreme Court similarly construed strictly the federal statute and held that it gave neither right to proceed on appeal *in forma pauperis* nor the authority for the court to grant the status. *Bradford v. S. Ry. Co.*, 195 U.S. 243 (1904).

207. *Harris v. Mutual Life Ins. Co.*, 13 N.Y.S. 718 (Sup. Ct. 1891).

208. I.T. Williams, *Cheap Justice* [Letter], 31 ALB. L.J. 199 (1885).

209. Not until 1879 did they come into the code as part of the reform that Field dreaded, the Throop code. That allowed that defendants might be granted *in forma pauperis* status.

210. *See* James R. Maxeiner, *Cost and Fee Allocation in Civil Procedure*, 58 AM. J. COMP. L. SUPP. 195, 218-19 (2010). *See also*, Maxeiner, *supra* note 73.

211. *E.g.*, the American Bar Association, the first national bar association, was founded in 1878.

aid.²¹²

In 1892 commercially-sensitive lawyers established the National Conference of Commissioners of Uniform State Laws, now known as the Uniform Laws Commission. It quickly proposed a Uniform Sales Act, but in 120 years it has yet to propose an access to justice act. The closest that it has come is the Model Public Defender Act for use in criminal justice.²¹³

In 1913 progressive lawyers founded the American Judicature Society to work for better courts. Although it has campaigned vigorously for non-political judicial selection, it has not found room in its program to promote civil legal aid for the poor.²¹⁴

In 1923 reform-minded lawyers led by like-minded judges and academics, established the American Law Institute.²¹⁵ Not until 2009 did a representative of a legal aid society address the Institute.²¹⁶ None

212. In 1921 its first committee report on the topic lamented that for forty years the ABA and legal aid societies "have existed side by side, without contact, without mutual recognition, and without joining hands." *Report of the Special Committee on Legal Aid Work*, 46 REPORTS OF THE AMERICAN BAR ASSOCIATION 493, 494 (1921). The Committee observed that "there is a direct responsibility both civic and professional, on members of the bar to see to it that no person with a righteous cause is unable to have his day in court because of his inability to pay for the services of counsel." *Id.* at 493. A few years later a successor committee proposed a legal aid act. *See First Draft of a Poor Litigant's Statute*, 49 REPORTS OF THE AMERICAN BAR ASSOCIATION 386 (1924), *reprinted in* REGINALD HEBER SMITH & JOHN S. BRADWAY WITH PREFACE BY WILLIAM HOWARD TAFT, *GROWTH OF LEGAL AID WORK IN THE UNITED STATES* 106 (1926). A second draft followed a dozen years later and was considered in the California legislature as recently as 1940.

213. *See generally* WALTER P. ARMSTRONG, JR., *A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* (1991).

214. *See generally* MICHAEL R. BELKNAP, *TO IMPROVE THE ADMINISTRATION OF JUSTICE: A HISTORY OF THE AMERICAN JUDICATURE SOCIETY* (1992).

215. *See generally* THE AMERICAN LAW INSTITUTE SEVENTY-FIFTH ANNIVERSARY 1923-1998 (1998), Kristen Davis Adams, *The American Law Institute: Justice Cardozo's Ministry of Justice?* 32 S. ILL. L. REV. 173 (2007).

216. Posting of Kristen D. Adams to 86th Annual Meeting Annual Meeting Blog [of the American Law Institute] <http://www.ali.org/index.cfm?fuseaction=meetings>

of its model acts or restatements provides for access to civil justice.

In 1938 in the Federal Rules of Civil Procedure, the bar accomplished the most important reform since the 1848 New York code.²¹⁷ In the Federal Rules it achieved a long sought goal: judicial and not legislative control of civil procedure.²¹⁸ The Federal Rules make no provision for access to justice. I am aware of no proposal to incorporate access to justice into the Rules.²¹⁹

3. ECLECTIC SUBSTITUTES FOR SYSTEMIC ACCESS TO JUSTICE

The nation could no longer tolerate the bar's indifference to access to justice. The public, individual lawyers and politicians responded to system of inaction as best as they could with legal aid societies, contingent fee representation, and self-representation (mostly in small claims courts). These advocates of access to justice have helped many, but only a small portion of all of those in need.

Legal aid societies. In 1876 German immigrants founded the nation's first and to this day leading legal aid society, now known as the Legal Aid Society of New York. The idea of a legal aid society is that the organization furnishes to needy applicants a lawyer typically paid a salary by the society. These privately funded societies began to have some wide successes in the first third of the twentieth century only to fall victim to the economic depression of the 1930s.²²⁰

.annual_blog&startrow=21 (May 19, 2009, 2:33 PM).

217. DAVID DUDLEY FIELD CENTENARY ESSAYS: CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM 55 (1949).

218. See THOMAS W. SHELTON, SPIRIT OF THE COURTS (1918).

219. The organized bar might defend this failure with the assertion that such revision would be beyond the scope of "civil procedure" governed by the enabling act. See Rules Enabling Act of 1934, 42 Stat. 1064, 28 U.S.C. §2072.

220. The history of legal aid is well documented. For 1876 to the 1960s, see generally Emery A. Brownell, Legal Aid in the United States (1951); Stephen K. Huber, *Thou Shalt Not Ration Justice: A History and Bibliography of Legal Aid in America*, 44 GEO. WASH. L. REV. 754 1976; LEGAL AID WORK (John S. Bradway & Reginald Heber Smith, eds., THE ANNALS vol. 124, March, 1926); HARRISON TWEED, THE LEGAL AID SOCIETY NEW YORK CITY 1876 – 1951 (1954); JOHN MACARTHUR MAGUIRE, THE

In the 1960s the war on poverty campaign of President Johnson revived legal aid societies through infusions of public funds. These publically-funded legal aid organizations also enjoyed success, but became the subject of political controversy. They faced a difficult challenge. Litigation costs are high and legal aid society funding was low. They had to choose among the cases they brought. They choose those that offered what they saw as proving the largest benefits for the lowest costs. However, unfortunately these were cases intended to create precedents of wide-ranging application. These cases entrenched interests.²²¹

Contingent fee litigation. Abolition of fee regulation made new forms of client contracts possible. The most celebrated—and the most criticized—is the contingent fee arrangement. These private contracts contribute to court access by allowing lawyers to agree to take their fees from their clients' winnings and to forego fees if their clients lose. Contingent fee contracts became common in the third quarter of the nineteenth century.²²² They were and are controversial because they invest lawyers with interest in the outcomes of the suits they bring. The fear is that contingent fee lawyers are guided by their own interests and not by those of justice. Although contingent fee arrangements are promoted as a means of providing court access, they are an imperfect one at best. They take from victorious plaintiffs a substantial portion of their award.²²³ They are practically available only to plaintiffs. They do

LANCE OF JUSTICE: A SEMI-CENTENNIAL HISTORY OF THE LEGAL AID SOCIETY 1876-1926 (1928).

221. In the 1960s federal funding became a feature of legal aid and has resulted in high levels of controversy surrounding it. See POVERTY LAW MANUAL FOR THE NEW LAWYER 18 (2002), available at <http://www.povertylaw.org/poverty-law-library/research-guides/poverty-law-manual/index.html>; EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM (1974, reissued with new material, 1978); SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING (1990); LEGAL SERVICES FOR THE POOR: TIME FOR REFORM (Douglas J. Besharov ed., 1992).

222. Compare EDWIN COUNTRYMAN, THE ETHICS OF COMPENSATION FOR PROFESSIONAL SERVICES: AN ADDRESS BEFORE THE ALBANY LAW SCHOOL AND AN ANSWER TO HOSTILE CRITIQUES (1882), with LESTER BRICKMAN, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA (2011). See generally Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231 (1997). The controversy extends to class action claims.

223. They thus encourage indeterminate legal claims. MAXEINER *ET AL.*, *supra* note

not extend aid as of right, but only in the discretion of lawyers who agree to take on cases. Lawyers take on cases where they observe sufficient prospects for their own success.

Small claims courts. Small claims courts are the urban successors of the rural courts of justices of the peace. They are considered products of the Progressive movement of the early twentieth century. They were the public's way of providing access to courts for persons of limited means and without access to lawyers.²²⁴ By their nature, they are available only up to a certain maximum amount in dispute—today, typically \$5,000.²²⁵ They often produce rough rather than legal justice in that procedures are informal and application of law approximate.

B. GERMANY

In Germany, government authorities had and have charge of administration of the courts and of admission of lawyers to practice. They have sought to realize the American promise that everyone "ought to have justice and right, freely without sale, fully without any denial..."²²⁶ Provision of legal aid in civil matters has never been earnestly questioned in the modern era of representative democracy.

1. LITIGATION AID BEFORE 1871 UNIFICATION

Until 1871 Germany consisted of many independent states. Following the French Revolution of 1789 the larger and more progressive states introduced codes of civil procedure that moved away from older written procedures to newer oral hearings.²²⁷ These codes recognized a new relationship of government and citizen different from the old relationship of ruler and subject. They started to move legal aid from a basis of solicitude for the

73, at 34-35.

224. See generally Eric H. Steele, *The Historical Context of Small Claims Courts*, 293 AM. B. FOUND. RESEARCH J. (1981).

225. See generally EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES* (1951)

226. *Supra* note 3.

227. See generally EUROPEAN TRADITIONS IN CIVIL PROCEDURE, 103, 107-12 (C.H. van Rhee ed., 2005).

poor to a right of citizens in states based on the rule of law.²²⁸

Already early in the nineteenth century some German states responded to popular calls for rule of law based legal systems. Some recognized that the rule of law requires equal access to justice. Perhaps they saw institutional self-interest in more responsive government. They moved to make legal aid an integral part of the system of civil justice. To deal with the popular demands for rule of law, they included legal aid in the codes of civil procedure that they drafted to deal with the popular demands for rule of law. They required that lawyers, as a condition for practice, provide legal services for free to needy litigants.

When the legislature adopted a code of civil procedure for the whole country in 1877, legal aid for poor citizens was already a well-established principle. The report explaining the 1877 Code of Civil Procedure justified the principle in a single sentence: "The exemption of poor litigants from lawyers' fees and costs follows from the necessity of equal protection under law for poor and rich."²²⁹ The principle has never come in for serious questioning.²³⁰

228. See TROCKER, *supra* note 108, at B7-B10.

229. "Die Befreiung armer Prozeßpartien von den Kosten folgt aus der Nothwendigkeit gleichen Rechtsschutzes für Arm und Reich." 1 HAHN, DIE GESAMTEN MATERIALIEN ZUR CIVILPROZESSORDNUNG UND DEM EINFÜHRUNGSGESETZ ZU DERSELBEN VOM 30. JANUAR 1877. AUF VERANLASSUNG DES KAISERLICHEN REICHSJUSTIZAMTES 206 (1880).

230. Even the Nazi Dictatorship, despite its perversion of the legal system, only tightened up requirements for aid; it did not challenge the principle. See HANS HINRICH SCHROEDER-HOHNENWARTH, DAS ARMENRECHT IN DER BUNDESREPUBLIK UND SEINE REFORM UNTER BESONDERER BERÜCKSICHTIGUNG WIRTSCHAFTLICHER UND RECHTSVERGLEICHENDER ASPEKTE [THE POOR LAW OF THE FEDERAL REPUBLIC OF GERMANY AND ITS REFORM WITH PARTICULAR REFERENCE TO COMMERCIAL AND COMPARATIVE ASPECTS] 14-15 (1976). Refugees from Nazi Germany who reached America were bewildered that the Nazi regime provided legal protection that the United States did not. See Albert A. Ehrenzweig, *Reimbursement of Counsel Fees in the Great Society: In sorrow and in anger—and in hope*, 54 CAL. L. REV. 792 (1966). Access to civil justice is anchored in the German constitutional order and now in that of Europe. In the 1950s the Federal Constitutional Court recognized the right as a principle of constitutional rank. See SCHROEDER-HOHNENWARTH, at 15-16 (citing cases). The Constitutional Court rests its finding on constitutional guarantees of equal protection (Article 3(1)), of the rule of law (Article 20(3)), of access to courts (Article 19(4)), and of the right to be heard (Article 103(1)). *Supra* note 137, § 114 I 1. It also finds support for legal aid in the social state principle Article 20(1). See *id.* at § 114 I 2.

2. WIDENING AND DEEPENING LEGAL AID SINCE 1871

In the 1870s Germany united in a federal state. It established a national ministry of justice to create federal laws and to supervise their implementation in member states.²³¹ A brief look at the ministry's activity since shows that often it has led making access to justice routine. It has moved the law to tailor decisions in individual cases more closely to individual circumstances. This is reflected in its positions on eligibility requirements and on its approaches to funding legal aid.

Economic need. The state legal aid provisions that predated the 1877 Code had relied on extra-judicial institutions to make determinations of economic need. Needs were based on overall wealth and were not related to the proposed litigation as such. Applicants were required to present to the court a written certificate of an appropriate public authority which expressly certified the applicant's poverty on the basis of the party's profession and the taxes the party paid. The Code of 1877 provided for aid if the applicant was "unable to defray the costs of the litigation without jeopardy to the means necessary for his and his family's sustenance..."²³² In other words, already the 1877 Code looked more to the particular case than to the overall financial circumstances. It did not require obtaining a certificate from an external authority. Today, following the 1980 Reform, the Code is more generous still: an applicant is entitled to legal aid if "according to her personal and economic circumstances she cannot meet the costs of the litigation or only in part or in installments."²³³

Case merit. The Ministry has largely advocated looser rather than stricter merit tests. The original draft of the Code of Civil

231. See, e.g., HANS SCHULTE-NÖLKE, DAS REICHJUSTIZAMT UND DIE ENTSTEHUNG DES BÜRGERLICHEN GESETZBUCHS [The Imperial Justice Authority and the Creation of the Civil Code] (1995).

232. Cappelletti, *supra* note 133, at 387-92. English translation of the relevant provisions of the Code of Civil Procedure as in force in 1975, i.e., just before the adoption of the 1980 Reform Law.

233. "[D]ie nach ihren persönlichen und wirtschaftlichen Verhältnissen die Kosten der Prozeßführung nicht, nur zum Teil oder nur in Raten aufbringen kann . . ." § 114 ZPO.

Procedure had no case merit test at all. It would have extended aid to all indigent. It was parliament that added in the first reading a case merit requirement. The plaintiff had to show that the claim was "not capricious or completely hopeless" (*nicht mutwillig oder völlig aussichtslos*). In the second reading parliament made that requirement stricter still by deleting "completely."²³⁴

In 1931, in the depth of the Great Depression, the government by emergency decree made the requirement much harder to meet: the applicant had to show probability of success. When the decree went out of force a few years later, the Ministry of Justice advocated for return to the original language of 1877. It was unsuccessful: parliament adopted the present language requiring a "sufficient likelihood of success" (*hinreichende Aussicht*).²³⁵

The courts gave the requirement of a "sufficient likelihood of success" a generous interpretation and have not relied on it to restrict granting legal aid.²³⁶ Already they gave the original 1877 provision a generous construction in favor of applicants: legal aid was to be authorized unless the hopelessness of the case was "clear on its face" (*klar auf der Hand*).²³⁷ As we have seen, all that "sufficient" requires is that from a legal standpoint, the legal position is "reasonably arguable" (*vertretbar*) and from a factual point, that evidence could be taken that would prove the necessary facts.²³⁸

Funding. The biggest changes in legal aid over the past 130 years have been in funding. The original law placed the burden of legal aid principally on lawyers and secondarily on aid recipients. The court, upon being convinced that applications were well-founded, ordered *provisional* relief from payment of costs, lawyers' fees and expenses. Applicants were theoretically required to repay

234. Hahn Mat II, 554+986. RG interpretation did not follow. JAMES GOLDSCHMITT, DIE PROZESS ALS RECHTSLAGE, 293-94 n. 1512 (1925).

235. SCHROEDER-HOENWARTH, *supra* note 218, at 12-13.

236. *Id.* at 14-15 (commenting that a description of the system would be incomplete without reference to case law).

237. *Id.* at 15.

238. STEIN/JONAS, *supra* note 135, 724-25, margin No. 22; GOTTWALD, *supra* note 98, at 470, margin No. 32.

the amounts from which they were provisionally exempted as soon as they could do so without jeopardizing family sustenance.²³⁹ In many cases, however, representation turned out to be mandatory *pro bono* work for lawyers.

In 1919, coincident with the general impoverishment of the country following the First World War, the system went from this mandatory *pro bono* system to the system of state-funded representation described above. The 1980 Reform made a major change in the footing of the participation of aid recipients in their own relief. Where before recipients were provisionally freed from all costs, which at least in theory, they were required to repay in full when they could, today as described above, they are permanently freed from all costs, but immediately begin making forty-eight limited co-payments. This reform was designed to broaden and normalize legal aid.

V. CONCLUSION

The ABA Model Access Act is a long overdue forward step. More than two hundred years ago Americans called on the world to provide civil justice to all. Today, almost all European countries do. The United States, in not providing a right to aid in civil litigation, shares company with only two European countries: Azerbaijan and Ukraine.²⁴⁰

The Model Act substantively is an imperfect step, for it would be limited to “basic human needs.” Justice for all knows no such bounds.

The Model Act technically is an imperfect step because it leaves critical questions of litigation control and financing unanswered.

The inevitable result both substantively and technically—

239. §125 ZPO (citing old version). See Cappelletti, *supra* note 133, at 391.

240. CEPEJ, *supra* note 10, at 50. Even dictatorial Belarus, the only European state not a member of the Council of Europe, seems to provide such a right. See VASIL KUHARCHYK, THE LEGAL PROFESSION IN BELARUS 17-19 (April 2008), available at <http://www.osce.org/odihr/36295>. Mention is not made of non-European countries only because I know of no summary of legal aid there as convenient as that of CEPEJ for the Council of Europe countries.

were it actually adopted—will be a cacophony of disparate legal aid systems.

In its own way, however, leaving so many critical questions open, creates the possibility of a new start for legal aid: introduction of a private attorney approach to legal aid. That could exist alongside the staff attorney approach.²⁴¹

The experience of the past thirty-five years should not encourage blind adherence to past approaches of legal aid society representation. In the United States, with our staff attorney approach, legal aid is controversial and ill-funded. Litigation legal needs remain unmet. In Germany, on the other hand, with its private attorney approach, legal aid is accepted as a routine feature of the system of civil justice available to all in need and not just to the impoverished. Counseling needs now receive attention.

Adoption of the Model Act presents an opportunity rare in contemporary comparative law: writing on an empty legislative slate. Today American legal aid is a matter of private charity and public appropriation. It has no legal form. Tomorrow, wherever the Model Act is adopted, legal aid will be a matter of right. Neither statutes or precedents, nor the Model Act itself, confine legal aid's future configuration.

Common objections that frustrate comparative learning generally are not tenable in legal aid. On the one hand, the underlying values are the same: access to justice and equal protection under law. On the other hand, there are no existing legal structures that rule out applying foreign experiences. Legislatures can do what they like, subject only to accommodations necessary to incorporate legal aid into the overall legal system or changes in the overall system necessary to permit that.

That cheery view, however, confronts political reality. It is hard to imagine a legislature today that could take up that challenge. It is only somewhat less hard to imagine a newly-

241. Already a generation ago, James Gordley posited that the best solution would be to have both. Gordley, *supra* note 81, at 226.

appointed State Access Board that would draw up such a plan. Where would it get funds and how would it obtain attorney buy-in?

The cheery view, moreover, confronts a still more daunting obstacle: the failures of the existing system of civil procedure. The poor are not the only ones deprived of a well-functioning system of civil justice. We all are. We cannot provide legal aid to all, because we cannot provide access to justice even for those who are well-off. ²⁴²

Earnest consideration of the Model Act should lead people to seriously reconsider the American system of civil litigation generally. It is not enough to build on the past. We must start over. To start over demands new ideas. It may well demand new institutions. But start over we must if we are to remain true to our nation's ideals of liberty and justice for all.

242. See generally, MAXEINER *ET. AL.*, *supra* note 73.